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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 530

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER, 1956

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FEDERAL POWER COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Humble Oil & Refining Company, a Texas corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on June 30, 1956.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals, printed App.[1] 1-45, have not been reported.[2] Petition for rehearing was denied by the Court of Appeals without opinion on August 21, 1956. The pertinent opinions and orders of the Federal Power Commission are set forth in the record (R. 71, 89).

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (App. 61). An order of the Court of Appeals

[1] "App." refers to the Appendix to this petition.

[2] In his dissenting opinion Judge Brown considers many other cases argued and decided at the same time and relating to Federal Power Commission action affecting independent producers of natural gas. While the dissent in its entirety has an important bearing here, that part designated "II. Suspension Cases." (App. 38-42) deals specifically with this cause.

denying rehearing was entered on August 21, 1956 (App. 62). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Does Section 19(b) of the Natural Gas Act permit review of an order of the Federal Power Commission suspending a periodic price step-up in a gas sales contract, filed with the Commission as an initial rate schedule, where such order is claimed to have been unlawfully issued and to deprive Petitioner of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00) without due process?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States and the Natural Gas Act, June 21, 1938, as amended, 52 Stat. 821-833, 15 U.S.C. Sections 717-717w. The pertinent provisions of each are set forth in the Appendix, pp. 63-67.

STATEMENT

On February 9, 1954, Petitioner entered into a nineteen (19) year contract with United Gas Pipe Line Company for the sale of natural gas produced by Petitioner in the Duck Lake Field, St. Martin and St. Mary Parishes, Louisiana. Among other terms, this contract contained a provision calling for periodic step-ups in price at fixed intervals over the life of the contract. One such step-up, in the amount of 1¢ per Mcf, from 13.5¢ to 14.5¢, was scheduled by the contract to become effective on June 1, 1955 (R. 18).

Under compulsion of Order 174-A, issued by Respondent

on August 6, 1954, subsequent to the decision of this Court in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), Petitioner on September 24, 1954, filed the foregoing contract with the Commission. Among other things, that order promulgated Sections 154.92 and 154.93 of the Commission's Regulations under the Natural Gas Act (18 CFR 154.92 and 154.93), requiring independent producers to file their sales contracts as "rate schedules". The Commission designated this contract as Humble Oil & Refining Company's FPC Gas Rate Schedule No. 35.

On April 21, 1955, Petitioner filed with the Respondent a notice to the effect that, under the terms of the foregoing contract, the applicable price for gas deliveries after June 1, 1955, and continuing until November 1, 1955, would be 14.5¢ per Mcf (R. 64-70).[3] By the order here under review, issued May 19, 1955, the Commission, with two Commissioners dissenting, purported to suspend the effective date of this 1¢ price step-up until November 1, 1955 (R. 71). The Commission did not set forth any reasons for the suspension, but instead used the stereotyped language that "the increased rates and charges proposed * * * have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful."

Petitioner filed an Application for Rehearing which the Commission denied on June 20, 1955, again with two Commissioners dissenting. Petitioner then perfected its appeal to the Court of Appeals for the Fifth Circuit under the provisions of Section 19(b) of the Natural Gas Act.

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[3] Such filing was made under threat of penalty for breach of another regulation promulgated by Commission Order No. 174, namely, 18 CFR 154.94(c), which provides in part that "the operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service * * * shall constitute a change in rate schedule." The Commission has read this provision — invalidly and ineffectually, we think — as a vehicle conferring upon it a power to suspend a rate in a contract filed as an initial rate schedule.

Petitioner's position was that, since it had filed its contract as an initial rate schedule, pursuant to Commission regulations, the Commission could not lawfully suspend any part of that initial rate schedule under Section 4(e) of the Act. The Commission itself expressly concedes its lack of power to suspend initial rate schedules (18 CFR 2.4(d), 2.52). Alternatively, Petitioner took the position that if Respondent could proceed under Section 4(e) it had not properly done so because no statement of the reasons for the suspension was given by the Commission, as is expressly required by Section 4(e) of the Act.

By judgment entered June 30, 1956, Petitioner's petition for review was denied by the Court of Appeals on the ground that it did not have jurisdiction to review such an order under Section 19(b) of the Act. Judge Brown dissented. Petitioner made timely filing of its Petition for Rehearing before the Court of Appeals, which that court denied without opinion on August 21, 1956, with Judge Brown again dissenting.

REASONS FOR GRANTING THE WRIT

I.

Decision Below Conflicts With Decisions Of Other Courts of Appeals.

The court below held the May 19, 1955 suspension order here involved to be interlocutory and not reviewable. It stated however that, upon review of the rate order ultimately issued after hearing, this "interlocutory order will be reviewable insofar as it may have affected the final order" (Slip Op. 9). But such postponement of review of an invalidly issued suspension order would inflict irreparable injury through loss, for the suspension period, of the higher contract rate, and would needlessly deny due process

through delay and forcing the conduct of a wholly useless hearing. In no event could such ultimate Commission rate order make Petitioner whole as to the loss inflicted upon it during the suspension period. *Hope Natural Gas Company* v. *Federal Power Commission,* 196 F. 2d 803 (C.A. 4, 1952). Nor is any hearing necessary — and none is claimed to be — in determining the asserted invalidity of the suspension order; this can be determined from the face of the order and Commission Regulations. These are the considerations which led other courts of appeals to decisions in conflict with that entered by the court below, as we shall show.

The court below held that the suspension order is not reviewable upon express application of the rule announced by it on the same day in *Magnolia Petroleum Company* v. *Federal Power Commission,* .... F. 2d .... (C.A. 5, 1956) (App. 46), as follows:

> "The review provisions of Section 19(b) thus relate *solely* 'to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case', *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, 385; *United Gas Pipe Line Co. v. Federal Power Commission,* D. C. Cir., 181 F. 2d 796, 798-799, *cert.* den., 340 U.S. 827."[4]

In thus adding "solely" to the *Metropolitan Edison* description, the court below rewrote this Court's characterization of the sort of orders contemplated by statutory review provisions, such as here involved. Other courts of appeals have been quick to recognize that *Metropolitan Edison* was not intended to be applied so restrictively.

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[4] *Humble* Slip Op. 6; *Magnolia* Slip Op. 12-13. Emphasis supplied throughout unless otherwise indicated.

For example, the Court of Appeals for the First Circuit in *Algonquin Gas Transmission Company v. Federal Power Commission,* 201 F. 2d 334, 337 (1953), stated that *Metropolitan Edison* "does not mean that judicial review must necessarily await the ultimate order finally terminating the underlying proceeding; but the order to be reviewable must be administrative action of a substantial character approaching some degree of finality." *Algonquin* held that a Federal Power Commission order denying an application for temporary certificate of public convenience and necessity was reviewable, although such denial was entered without hearing and before completion of a previously ordered hearing on Algonquin's application for a certificate.

In *Algonquin,* the Commission conceded reviewability of the order involved and the court was "certain" of its present jurisdiction to review (201 F. 2d at 337).

Nor was the Court of Appeals for the Third Circuit deterred from undertaking a review of a Commission order entered without a hearing. *Mississippi River Fuel Corporation* v. *Federal Power Commission,* 202 F. 2d 899 (C.A. 3, 1953), pet. for *cert.* dismissed on motion of counsel for petitioner, 345 U.S. 988 (1953).

But we need not be content with parallels from analogous circuit decisions; for we have at least two circuit cases involving Federal Power Commission suspension orders of the exact type as here involved. In both, the orders were held reviewable. One of the cases is a Fourth Circuit decision styled *Atlantic Seaboard Corporation* v. *Federal Power Commission,* 201 F. 2d 568 (1953); the other is the Tenth Circuit decision in *Phillips Petroleum Company* v. *Federal Power Commission,* 227 F. 2d 470 (1955).

In *Atlantic Seaboard,* the Commission suspended a rate change, dating the suspension from the date on which additional data was filed by the applicant, rather than from

the earlier date upon which the rate change was filed. The court held this amounted to an illegal suspension of twenty-two days beyond the maximum period of five months allowed by the statute. Reviewability of the suspension order under Section 19(b) of the Act was directly in issue. Asserting that its review power is not limited to "final" orders, the court held the suspension order to be reviewable, saying (201 F. 2d at 572):

> "The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definitive to justify us in exercising the power of review vested in us by the statute. See *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 1 Cir. 201 F. 2d 334 • • • (numerous other citations omitted)."

In our case, the court below held that *Atlantic Seaboard* is "clearly distinguishable from the case at bar". The majority, however, fails to state in what, if any, particular *Atlantic Seaboard* is distinguishable. It is clear that a rate suspension order purportedly issued under Section 4(e) of the Natural Gas Act was involved in each case. The only difference in the two cases which we can see is not a ground for distinction, but makes the rule of *Atlantic Seaboard* even more applicable to the facts of this case. That difference is that Atlantic Seaboard contended that the suspension order was invalid for a period of twenty-two days, whereas Humble contends the suspension order here is invalid for the entire five-month suspension period and thereafter. It is also noteworthy that Judge Brown, dissenting in the court below, found no ground for distinguishing *Atlantic Seaboard* from the case at bar, saying (Separate Slip Op. 37):

> "Precisely this problem—an illegal suspension order —was presented in *Atlantic Seaboard Corp.* v. *Federal*

> *Power Commission*, 4th Cir. 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, 'We think that case is clearly distinguishable from the case at bar.'"

We submit there is no basis for distinction.

The Commission did not petition for a writ of *certiorari* in *Atlantic Seaboard*.

The Tenth Circuit was likewise unable to distinguish the *Atlantic Seaboard* suspension order from the suspension order before it in the *Phillips* case, *supra*. In *Phillips*, the suspension order involved a Commission attempt to suspend what the court later held to be a nonsuspendible initial rate schedule. Phillips had filed with the Commission as its rate schedule its gas sales contract with Michigan Wisconsin Pipe Line Company, along with certain supplemental agreements, following the holding of this Court in *Phillips Petroleum Company* v. *State of Wisconsin*, *supra*. The Commission purported to suspend two of the supplemental agreements on the assumption that they were, in effect, increases in the filed rate schedule. The court quoted the Supreme Court's statement in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), that "the ultimate test of reviewability is not found in an over-refined technique" (227 F. 2d at 474). And referring to *Atlantic Seaboard* and *Algonquin*, it embraced the rule that "[R]eviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review" (*ibid.*). Accordingly, with respect to the suspension order there under review, the court held (227 F. 2d at 475):

> "In any event, the legal consequences which attach to these orders have conclusive effect upon the rights

and duties of Phillips as an independent producer under the Natural Gas Act and they are therefore reviewable."

After a step-by-step analysis, the court held the contracts and supplements filed by Phillips to be one rate schedule, which was Phillips' initial rate filing covering its effective rate as of June 7, 1954. For this reason, the court held the rate to be beyond the Commission's suspension power under Section 4(e) of the Act. This is the primary ground upon which we attacked the suspension order here, namely, that the rate involved is nonsuspendible because it is that stipulated by Humble's initial rate filing. In both cases, the "legal consequences which attach to these orders have conclusive effect upon the rights and duties" of the parties "under the Natural Gas Act and they are therefore reviewable." In neither case is a hearing necessary to determination of the asserted invalidity of the suspension order.

The Commission did not petition for a writ of *certiorari* in *Phillips*.[5]

We submit that this direct conflict between the decision of the court below and the decisions on exactly the same point by the Fourth and Tenth Circuits presents a matter which should be resolved by this Court.

The suggestion by the court below that the suspension order will be reviewable insofar as it may affect the final order issued in the rate hearing before the Commission offers no basis for the holding that such order is not presently reviewable. When the hearing upon the rate here involved is ultimately held, the order which the Commission may then enter cannot, as we have seen, make up the loss inflicted upon Petitioner during the suspension period.

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[5] A petition filed by Michigan Wisconsin Pipe Line Company was denied, *Michigan Wisconsin Pipe Line Company* v. *Phillips Petroleum Company*, ... U.S. ...., 76 S. Ct. 649 (1956).

Hope Natural Gas Company v. *Federal Power Commission, supra.* Moreover, if Petitioner is right in its position, any such hearing is rendered wholly unnecessary and thus wasteful of time and expense, and hence a denial of due process. Finally, Petitioner should not be forced to go through such a hearing (which would be a Section 4 hearing) wherein the burden of proof is on it, before it can test the validity of the suspension order, when, if petitioner is correct in its position on the merits, the only proceeding in which the Commission can properly involve Petitioner is a Section 5 hearing wherein the Commission must bear the burden of proof. Clearly this is a situation wherein a present review is not only appropriate but is necessary to protect Petitioner's rights. The other Courts of Appeals in *Atlantic Seaboard* and *Phillips* so treated similar suspension orders there involved.

II.

Decision Below Misconstrues and Conflicts With Applicable Decisions Of This Court.

The court below has applied criteria of reviewability of administrative orders based upon a demonstrable misunderstanding of this Court's decision in *Metropolitan Edison.* Moreover, the court below reached its decision in a way in conflict with applicable principles laid down in other recent decisions of this Court, notably, *Frozen Food Express* v. *United States,* .... U.S. ...., 76 S. Ct. 569 (1956), and *United States* v. *Storer Broadcasting Company,* .... U.S. ...., 76 S. Ct. 763 (1956). To these conflicts, we now turn.

As already noted, the court below ruled that (Slip Op. 6):

> "The review provisions of Section 19(b) thus relate *solely* 'to orders of a definitive character dealing with the merits of a proceeding before the Commission

and resulting from a hearing upon evidence and supported by findings appropriate to the case' * * *."

In so doing, the court quoted from and relied directly upon *Metropolitan Edison.*[6] But it is clear from the opinion in *Metropolitan Edison* that this Court did not fix so restrictive a rule of reviewability. The superimposition of "solely" by the court below finds no warrant in *Metropolitan Edison,* as we shall see.

It is important to an understanding of *Metropolitan Edison* that we realize the peculiar manner in which an appeal was taken into the courts from a *procedural action* of the Federal Power Commission. By a 1936 order, the Commission launched a general investigation of Metropolitan Edison. Subsequently, in 1937, the Commission issued another order (a) fixing a date for hearing, (b) requiring respondents to appear, and (c) requiring them to produce certain information and documents pertaining to the organization and ownership of Metropolitan Edison and possible affiliates. Metropolitan Edison, believing that the Commission was exceeding its jurisdiction by inquiring into corporate organization and ownership, filed with the Commission a petition for rehearing of the 1937 order. The Commission granted rehearing, during the course of which the Commission Staff offered evidence which Metropolitan Edison did not think was relevant to the particular issues presented on rehearing. Metropolitan Edison thereupon requested the Commission to define the issues for purposes of rehearing. This motion was denied.

Thereupon, respondents filed a petition in the Court of Appeals for the Third Circuit asking for a rule to show

[6] In addition, the court also cited *United Gas Pipe Line Company* v. *Federal Power Commission,* 181 F. 2d 796 (C.A.D.C., 1950), *cert.* den., 340 U.S. 827 (1950). But that decision avails nothing, for it merely holds to be nonreviewable legislative rules of general applicability and of no present effect.

cause why the Commission should not be confined to the issues presented on rehearing. The Circuit Court issued a rule to show cause, granted a temporary stay, and ultimately on hearing the case remanded it to the Commission with instructions that the Commission should confine itself to the issues presented on rehearing.

Upon petition of the Commission, *certiorari* was granted by the Supreme Court. This Court pointed out that the review provision of the Federal Power Act,[7] which corresponds to Section 19(b) of the Natural Gas Act, allows review of an "order" of the Commission. The only orders issued by the Commission were the 1936 investigation order and the 1937 rehearing order; no review of either such order would lie, and none was sought. In short, this Court said that there was no "order" before the court for review.

While the foregoing determination was sufficient alone to dispose of the case, the remainder of the *Metropolitan Edison* opinion constitutes a reply to other contentions of the Company. Metropolitan Edison contended that a court of appeals could intervene under Section 262 of the Judicial Code to protect its prospective jurisdiction. But this Court held that it had no jurisdiction to protect. This argument, of course, assumed that rehearing would be denied to respondents on the 1937 investigation order and that the order was of such type that it could be reviewed.

In sum, *Metropolitan Edison* holds only that a mere procedural order not involving present injury is not reviewable. It does not hold that *any* order issued without a hearing is not reviewable.

The language in *Metropolitan Edison* upon which the court below relied as the basis for its holding is quite revealing (304 U.S. at 384):

[7] Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U.S.C. 8251).

> "The context in section 313(b) *indicates* the nature of the orders which are subject to review. * * * The statute *contemplates* a case in which the Commission has taken evidence and made findings. * * * The provision for review thus *relates* to orders of a definitive character * * *."

Such terminology does not suggest one and only one situation under which review can be obtained. On the contrary, this Court carefully refrained from any such limitation, as "solely", which was contributed by the court below.

Surely Congress did not intend, and the Supreme Court did not and would not hold, that courts of appeals must decline to review any Commission order issued short of hearing, regardless of how arbitrary, capricious, and illegal it might be.

We are not alone in our interpretation of *Metropolitan Edison*. The Fourth and Tenth Circuits respectively in *Atlantic Seaboard* and *Phillips, supra,* recognized that the language of *Metropolitan Edison* is not to be applied so restrictively as did the court below. In disposing of the question of reviewability of rate suspension orders, the other circuits cited and distinguished *Metropolitan Edison*. In *Atlantic Seaboard,* after stating that losses sustained during the period of suspension could not be recouped, the court puts its finger on a basic difference between the "notice" in *Metropolitan Edison* and the suspension order before it in these words (201 F. 2d at 572):

> "The order which we are asked to review is therefore sufficiently *distinct from the general subject of the litigation* and sufficiently final and definitive to justify us in exercising the power of review vested in us by the statute."

The court then referred to a number of cases, including the Supreme Court's opinion in *Columbia Broadcasting.* Quoting from *Columbia Broadcasting,* the court also made the further point that the ultimate test of reviewability is protection from irreparable injury threatened by administrative rulings "which attach legal consequences to action taken in advance of other hearings" (*ibid.*).

Similarly, the fact that the Tenth Circuit undertook to review a Commission suspension order which was issued without hearing in the *Phillips* case, *supra,* makes plain the fact that it does not view *Metropolitan Edison* as holding judicial review to be available "solely" as to orders issued after hearing. Indeed, observing that "reviewability is not strictly limited to final orders" (227 F. 2d at 474), that court quoted the language from *Metropolitan Edison* on which the court below relied, and then added a quotation from *Columbia Broadcasting* and its own conclusion that (*ibid.*):

> "* * * [R]eviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review."

Moreover, we submit that the restrictive interpretation of *Metropolitan Edison* by the court below is in conflict with applicable principles woven into the fabric of the 1956 decisions of this Court in the *Frozen Food* and *Storer* cases, *supra.*

In *Frozen Food,* an order of the Interstate Commerce Commission listing commodities which are not "agricultural" within the meaning of an exemption provision of the Interstate Commerce Act was held to be reviewable, even though it commanded no action, on the ground that it had an "immediate and practical impact on carriers"

and touched "vital interests of shippers and carriers alike" in setting the standards for shaping the manner in which an important segment of the trucking business will be done (76 S. Ct. at 571).

In *Storer,* regulations of the Federal Communications Commission relating to multiple ownership of radio and television stations were held to be reviewable because they "presently aggrieve" the petitioner, this Court referring to its opinion in *Columbia Broadcasting* as holding the regulations there involved to be reviewable because they "presently affected existing contractual relationships" (76 S. Ct. at 768).

In neither *Frozen Food* nor in *Storer* did this Court require postponement of review until the administrative agency should implement the general regulation involved. Instead, such regulations were held reviewable because of their "present" effect. In our case, despite the order's undisputed present effect in inflicting loss during the suspension period, the court below would compel postponement of judicial review of that order until its consideration in conjunction with review of the Commission's ultimate rate order, at which time the Commission would be powerless to permit Petitioner to recoup such loss, even if the Commission could then be persuaded of the invalidity of its suspension order.

It becomes more and more obvious with each decision of this Court that the test of reviewability is whether the administrative order presently affects existing rights and duties. A rate suspension order such as that involved here results not in threatened future injury but in a present definite loss of revenue. It is unquestioned that Humble will suffer a cash loss of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00) during the five-month suspension period which the Commission cannot correct by

retroactive adjustment or allowance of future increases in rate. See *Hope* and *Atlantic Seaboard, supra.* The Commission did not dispute this fact in the court below and will not dispute it here. The Commission will probably say merely that the loss of revenues during the suspension period is one of the unfortunate but inescapable consequences flowing from operation of the administrative process. We insist that misuse of suspension power inflicting present injury cannot be so insulated from judicial review and correction. Certainly, Congress never intended such a wanton abandonment of due process.

We submit that the court below has thus decided a federal question in a way in conflict with applicable decisions of this Court, and for this additional reason the writ should issue.

III.

Decision Below Raises Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

The conflicts of decision, referred to hereinabove, center around basic questions in the Commission's administration of the rate provisions of the Natural Gas Act. Those questions have an obvious and extraordinary economic importance to the portions of the natural gas industry so regulated. Moreover, those questions have a corresponding importance to the Commission in its efforts to discharge its tremendously expanded regulatory duties, particularly those arising in connection with Section 4(e). All of these considerations have been accentuated since this Court's decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672 (1954).

There are outstanding today hundreds of Commission suspension orders, purportedly issued by the Commission under its authority in Section 4(e). Common to many of such orders is the very question of reviewability, decided by the court below in conflict with decisions of other circuits. Millions of dollars are jeopardized by such orders.

Long delays have already been experienced in conjunction with the mounting number of such suspension orders. Years will pass before the Commission can possibly discharge its administrative duties in connection therewith. It is obvious, therefore, that prompt decision by this Court upon the foregoing questions of industry-wide importance will prove beneficial to numerous parties and to the Commission itself. In addition to those questions, still another related matter remains to be mentioned.

As stated earlier, the court below refrained from passing on the merits of the case, *i.e.*, whether an "initial" rate filing controlled by Section 5(a) of the Act is here involved, or whether a rate "increase" governed by Section 4(e) is in question. Assuming, *arguendo,* that the merits are properly determinable under Section 4(e), we submit that the language of that Section patently reveals the legislative intent that rate suspension orders should be reviewable by the courts.

Section 4(e) reads in part as follows:

> "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing * * *; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and *delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension,* may suspend the operation of such schedule * * *."

Obviously, Congress intended that a written statement of reasons for the suspension should be given so that the aggrieved party could have an opportunity to convince the Commission of the error of its ways; and, failing in such effort, should have an opportunity to demonstrate to a court that the administrative agency had acted arbitrarily, capriciously, or otherwise unlawfully. Congress did not intend to allow the Commission to act summarily in finally depriving a natural gas company of substantial revenues for a period up to five months in duration. To assure due process, the Act requires a written statement of the reasons for the suspension. This carries a plain implication that the natural gas company is to be given the right of review.

The legislative intention that Commission suspension orders be reviewable is thus fortified by the provision for a statement in writing of the reasons for the suspension. The requirement of reasons is clearly mandatory, and the failure of the Commission to comply with the statute renders its order invalid. See *Amarillo-Borger Express, Inc.* v. *United States*, 138 F. Supp. 411 (N.D. Tex., 1956);[8] *American Airlines, Inc., et al.* v. *Civil Aeronautics Board*, ... F. 2d .... (No. 13044, C.A. D.C. July, 1956).

In short, we submit that several important questions of federal law are here involved which have not been, but which should be, settled by this Court.

CONCLUSION

We urge that this Petition for a Writ of Certiorari should be granted for the reasons hereinabove set forth.

[8] Review of this case is pending before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, airmail, postage prepaid, to each of the following attorneys for Respondent on the 24 day of October, 1956:

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OCT 26 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 530

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15704

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petition for Review of an Order of the Federal Power Commission, sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES, and BROWN, Circuit Judges.

BORAH, Circuit Judge: This is one of six cases which presents a common question of law concerning the validity of orders of the Federal Power Commission suspending changes in rates for sales of natural gas by the respective petitioners.

Petitioner herein has invoked the jurisdiction of this Court under Section 19(b) of the Natural Gas Act to review an order of the Federal Power Commission issued on May 19, 1955, by which the Commission suspended for a period of five months a rate filed by petitioner covering certain of its sales of natural gas to United Gas Pipe Line Company.

The facts to the extent that they need be stated are these: By a contract dated February 9, 1954, petitioner agreed to sell natural gas to United for a term of nineteen years from the date of the initial delivery of gas

thereunder, and deliveries commenced on June 1, 1954, which was six days prior to the date on which the Supreme Court handed down its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672. As we set forth at length in *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15,320, this day decided, the Commission thereafter issued its series of 174-Orders in which it promulgated rules and regulations providing for the filing of rate schedules by "independent producers"[1] of natural gas subject to the jurisdiction of the Commission in which schedules were to be set forth the terms and conditions of service and all rates and charges effective on and after June 7, 1954, for the transportation and sale of natural gas in interstate commerce. "Rate schedule" was defined in the regulations to mean "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . ." And in respect to periodic increases contained in such basic contracts the regulations provided that: "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule." These regulations further provided that, with certain exceptions not here material, no change could be made in any such rate schedule without first filing a notice of change in rates not less than thirty nor more than ninety days prior to the effective date thereof pursuant to Section 4(d) of the Natural Gas Act.

[1] The term "independent producer" was defined in the regulations, 18 C.F.R. §154.91, as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

On September 24, 1954, petitioner filed under protest and with jurisdictional reservations the aforementioned contract of February 9, 1954, as amended, covering its sales of natural gas to United, which when filed was assigned a number and designated a "Rate Schedule" by the Commission. Under the terms of this contract, and to the extent here pertinent, the prices to be paid for all gas to be delivered to United during the life of the contract were stipulated to be as follows: during the one year period commencing on the date of first deliveries of gas thereunder (June 1, 1954 to June 1, 1955), 12.35 cents per Mcf., and during the period commencing on the expiration of the first one-year period and extending until November 1, 1955, 13.35 cents per Mcf. The contract also provided that 1.15 cents were to be added to each of the above-stated prices to cover a tax reimbursement of one cent per Mcf., and a service charge of .15 cents per Mcf. On April 21, 1955, in compliance with the regulations provided in the 174-Orders, but under like protest, petitioner filed with the Commission a notice to the effect that under and pursuant to the terms of its contract with United, the applicable price to be paid for gas delivered thereunder, effective June 1, 1955, would be 14.5 cents per Mcf. By an order issued May 19, 1955, the Commission ordered that a public hearing be held upon a date to be fixed by the Commission, and suspended the proposed changes in rates and charges "until November 1, 1955, and until such further time as it is made effective in the manner prescribed by the Natural Gas Act." The reasons for its action were stated by the Commission as follows: "The increased rates and charges proposed in the aforesaid filings have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." And its findings were that: "It is necessary and

proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning the lawfulness of the said proposed changes, and that the above-designated supplement be suspended and the use thereof deferred as hereinafter ordered." Following the issuance of the order of May 19, petitioner applied to the Commission for a rehearing thereof in which it sought to have the Commission "affirmatively recognize the validity and effectiveness of all components of the rate set forth in Humble's contract with United dated February 9, 1955 . . . including particularly the price thereby made effective on and after June 1, 1955, and that the Commission forthwith abrogate without hearing . . . or after such hearing . . . said order issued May 19, 1955." The Commission, being of opinion that the grounds for rehearing alleged in the application did not present any question of fact or law not fully considered by it prior to the issuance of its May 19 order, and therefore did not warrant a rehearing, denied the application for rehearing by an order issued on June 20, 1955.

Following the denial of its application for rehearing, petitioner filed this petition for review together with a motion for stay pending review by this Court, urging in both pleadings that it is aggrieved and is suffering irreparable injury by reason of the fact that the revenues lost by it, alleged to be a net loss of $22,500 per month, cannot be recouped. In its petition for review, it claims that the order is invalid for numerous reasons, the most important of which are substantially as follows: (1) that the prices involved were contract prices and as such constituted the "initial" rate filed by petitioner which is not subject to suspension under Section 4 of the Natural Gas Act; (2) that the order does not contain "a statement in writing

of the reasons for such suspension" as is required by Section 4(e) of the Act; (3) that the order is arbitrary, capricious, and unduly discriminatory, contrary to the provisions of the Natural Gas Act and to the Commission's announced rate policy; and (4) that the action of the Commission abrogates petitioner's contract and constitutes a confiscation of its property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States. The Commission, in turn, filed a motion to dismiss the petition for review and to deny the motion for stay on the grounds that this Court has no jurisdiction under Section 19(b) of the Act to review or to stay the order because it is not a definitive order entered after hearing and completion of the administrative process, and that in any event petitioner has failed to show legally cognizable irreparable injury or that the equities justify the issuance of a stay. Upon consideration of petitioner's motion for stay and the Commission's opposition thereto, this Court on August 25, 1955, issued an order denying the stay.

The questions presented by the petition and the motion to dismiss include the reviewability and, if reviewable, the validity of the Commission's order. The question of reviewability necessarily involves a determination of whether we have jurisdiction to review such order under Section 19(b) of the Natural Gas Act. In *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* we observed that this statutory review provision of the Act contemplates a review by this Court of definitive orders entered after hearing and upon completion of the administrative process, and what we said there with regard to the conditions necessary for our review of the Commission's action is controlling here.

Applying this test of reviewability, we have here a situation where the Commission, exercising its regulatory jurisdiction and acting under one of the sections of the Act which do not require a hearing, has consistent therewith entered an order without a hearing first had. Applicable Section 4(e), in pertinent part, provides: "Whenever any such new schedule is filed the Commission shall have authority . . . *to enter upon a hearing* concerning the lawfulness of such rate, charge, classification, or service; and, *pending such hearing and decision thereon,* the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect . . ." Moreover, the order in question is in no proper sense a definitive order. It is a mere procedural step taken at the inception of and not upon the completion of the administrative process. A realistic appraisal of the order and the function it performs demonstrates that it is interlocutory and that its issuance had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase.

As supportive of its claim that the suspension order here involved is reviewable, petitioner relies upon *Atlantic Seaboard Corporation, et al.* v. *Federal Power Commission,* 201 F. 2d 572, but we think that case is clearly distinguishable from the case at bar. Consistent with what we have said above, the Court citing *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, there recognized that Section 19(b) gives the Courts of Appeals power

to review an order of the Commission upon the petition of a party aggrieved and that mere preliminary or procedural orders or orders which do not finally determine rights of the parties should not be reviewed thereunder. On the facts there presented, however, the Court concluded that the order there sought to be reviewed was not of that sort, but instead was "sufficiently distinct from the general subject of the litigation and sufficiently final and definitive to justify us in exercising the power of review vested in us by the statute." Thus, it is apparent that the Court did not undertake in the *Atlantic* case to review an interlocutory order, such as the one we have here, which is not definitive under the announced test for reviewability under Section 19(b).

What is really sought by petitioner is that this Court should halt inquiry at the threshold in order to rule *in limine* upon the propriety of the Commission's action and whether it should proceed further. It may be desirable that the law should provide for a preliminary judicial review of questions of this kind, but in the absence of such a provision we cannot assume that power. If petitioner is correct in any or all of its several contentions relating to the validity of the order, this interlocutory suspension order may infect with invalidity the final, definitive order of the Commission which will issue after hearing had and findings made upon evidence. In that event, upon judicial review of the definitive order, the interlocutory order will be reviewable insofar as it may have affected the final order. The conclusion we have reached that this Court has no jurisdiction to review the suspension order at this time, renders it both inappropriate and unnecessary to pass upon the contentions that the prices involved constituted "initial rates", that the Commission failed to state "reasons" for such suspension as required

by the Act, and that the order is contrary to the Natural Gas Act and violates petitioner's rights under the Fifth Amendment to the Constitution of the United States. The petition accordingly will be dismissed for the reason that Section 19(b) of the Act does not confer upon this Court jurisdiction to entertain it and it is so ordered.

BROWN, Circuit Judge, dissenting.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15320

MAGNOLIA PETROLEUM COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15321

THE OHIO OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15352

THE SUPERIOR OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15354

WESLEY WEST,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15471

GULF OIL CORPORATION AND GULF REFINING COMPANY,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15470

THE TEXAS COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioners,

versus

FEDERAL POWER COMMISSION,

Respondent.

No. 15704

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15627

STANOLIND OIL & GAS COMPANY, ET AL.,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15678

CONTINENTAL OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15799

HUNT OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15928

HUNT OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15749

ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY,

Petitioner,

versus

FEDERAL POWER COMMISSION,

Respondent.

[*Petitions for Review of Certain Orders of the Federal Power Commission sitting at Washington, D. C.*]

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and carefully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission that these cases are not to be reviewed "in a vacuum" — a figure with

which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, ... U.S. ...., ... L. Ed. .... [Nos. 158-161, October Term 1955, April 23, 1956]; *United States* v. *Storer Broadcasting Company*, ... U.S. ...., ...L. Ed. .... [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously

[1] If our decisions and Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F. 2d 461, stand, there is no review of these substantial questions in sight, for Federal Power Commission v. Union Producing Company, D.C.Cir., 230 F.2d 36; Gulf Oil Corporation v. Federal Power Commission, D.C.Cir., 230 F.2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character of "review" is given to the State Tax Escalation Cases (note 2, infra), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all of these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and exposition, I approach each case from the standpoint of the basic question of reviewability and decline to find some way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly committed to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are

[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Gulf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company; No. 15928, Hunt Oil Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisions.

put forward solely to put flesh on these bones, to show the vital impact of agency action and the existence of substantial, serious, frequently difficult questions.

THE STANDARD OF REVIEWABILITY

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc.* v. *United States, supra,* ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of

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[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Columbia Broadcasting System, Inc. v. United States, supra, at 316 U.S. 425, 86 L.Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. * * * The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L.Ed. 1571. "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it.* * *" *Id.* at 316 U.S. 420, 86 L.Ed. 1573.

Federal Communications Com. v. American Broadcasting Co., 347 U.S. 284, 98 L.Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L.Ed. 817.

[4] Section 21(b) (15 USCA 717t (b)): "Any person who wilfully and knowingly violates any rule, *regulation,* restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition to* any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and *every day* during which such offense occurs." [italics mine]

the regulations brings these cases within the pre-*Columbia* law.[5]

Any lingering doubts must have evaporated with *Frozen Food Express* v. *United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding, with the report, seventy-one pages in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 USCA 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States* v. *Los Angeles Railroad Co.*, 273 U.S. 299, 71 L. Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the

[5] Mr. Justice Frankfurter's dissent in *Columbia, supra,* 316 U.S. 429, 433, 434, 86 L.Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His comment analyzing United States v. Berwind-White Coal Mining Co., 274 U.S. 564, 71 L.Ed. 1204, as well as the other cases, United States v. Baltimore & Ohio Railroad Co., 293 U.S. 454, 79 L.Ed. 587; American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 81 L.Ed. 142; Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 56 L.Ed. 729; Chicago, R.I. & P.R. Co. v. United States, 284 U.S. 80, 76 L.Ed. 177; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L.Ed. 1147, involving specific penalties for violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L.Ed. 1580, 1581.

Commission is in substance a 'declaratory' one * * * 5 USC 1004(d) which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * *"

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra,* holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one in that business prior to the denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine

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[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320) with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiencies Act, (October 22, 1913, 38 St.L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer,* of course, it was our precise situation—a statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. Scripps Howard Radio, Inc. v. Federal Communication Commission, 316 U.S. 4, 15, 16, 86 L.Ed. 1229, 1237, "It is urged that the orders reviewable under §402(a) * * * are intrinsically different from those reviewable under §402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington * * *." See also, Philadelphia Co. v. S.E.C., D.C.Cir., 164 F. 2d 889 at 897, cert. den. 333 U.S. 828, 92 L.Ed. 1114, subsequent proceedings, 175 F. 2d 808, reversed as moot 337 U.S. 901, 93 L.Ed. 1715.

Amshoff v. United States, 7 Cir., 228 F.2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed, over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a definitive character dealing with

has an expansive vitality to require that Courts view these matters in the light of a living world.

I.

ORDER 174 CASES

A consideration of but a few parts of Orders 174 A or B will demonstrate, I think, that the action of the Commission has tremendous practical, direct business consequences on those who produce natural gas.

The Order Determines Who Is Subject to the Act

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made

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the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 * * *" cannot, by a bootstrap-lifting process, defeat reviewability. The absence of a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, National Coal Association v. Federal Power Com., D.C.Cir., 191 F.2d 462, 466; Saxton Coal Mining Co. v. National Bituminous Coal Comm., D.C.Cir., 96 F.2d 517; American Sumatra Tobacco Corp. v. S.E.C., D.C.Cir., 93 F.2d 236; Philadelphia Co. v. S.E.C., supra; see also, Columbia Oil and Gasoline Corp. v. S.E.C., 3 Cir., 134 F.2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, infra.

[7] §154.91 " 'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [italics mine]

between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation therefore reflects the Administrator's interpretation[8] of an opinion which is, or may be, read much differently by others.

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

> "* * * production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L. Ed. at 1045.

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[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in Phillips Petroleum Company v. Wisconsin et al (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. * * *"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "* * * These orders [174] stem directly from the decision of the Supreme Court in Phillips Petroleum Co. v. Wisconsin * * * in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a '"natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission * * * promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. * * * the Supreme Court held in Phillips Petroleum Co. v. Wisconsin, * * * that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "* * * the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering * * *."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in Federal Power Com. v. J. M. Huber, D.N.J., 133 Fed.Supp. 479 (now on appeal Third Circuit).

Nothing in that opinion[9] impairs the authority of its prior holdings that Section 1(b) "* * * precludes the Commission from any control over the activity of producing or gathering natural gas", *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 603, 89 L.Ed. 1206, 1223; that the Commission has no power "* * * to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U.S. 682, 690, 91 L.Ed. 1742, 1748; that the regulations of the Commission may not be "* * * inconsistent with the exercise by [the states] * * * of the powers over production and gathering of natural gas reserved to it by Congress in §1(b) of the Act", Id. at 331 U.S. 691, 91 L.Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed)

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[9] In the Phillips case (347 U.S. at 678, 98 L.Ed. at 1045-1046), the court reaffirms the previous cases on Section 1(b); "In Federal Power Commission v. Panhandle Eastern Pipeline Co. 337 U.S. 498, * * * we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the producing properties and gathering facilities of a natural gas company'. Similarly in Colorado Interstate Gas Co. v. Federal Power Com. 324 U.S. 581, 598 * * * we stated that '[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas, *Id.* 324 U.S. at 602, 603. See also, Federal Power Com. v. Hope Natural Gas Co., 320 U.S. 591, 612-615, 88 L.Ed. 333, 350-352 * * *; Peoples Natural Gas Co. v. Federal Power Comm. 75 App. D.C. 235, 127 F.2d 153; cf. United States v. Public Utilities Com. 345 U.S. 295, 307-311, 97 L.Ed. 1020 * * *."

and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t (a).

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple entrepreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

The Order Requires Filing Of Rate Schedules

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent Producers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), "* * * Order 174-A is not a formal determination of any right or obligation; is not

[10] Order 174 A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, [subsequently changed to December 1, 1954] file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * *."

self-executory, and it does not command these petitioners to do or refrain from doing anything. * * *"

Since the Order (§ 154.92) is directed to an "Independent Producer" who is, in turn, defined in§154.91 to be those who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute requirement for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine]

Whatever may be the juridical metaphysics, e.g., Douglas v. County of Pike, 101 U.S. 677, 25 L.Ed. 968; Norton v. Shelby County, 118 U.S. 425, 30 L.Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers. Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638; *Public Service Comm'n* v. *Wycoff*, 344 U.S. 237, 97 L.Ed. 291; *Canadian River Gas Co.* v. *Federal Power Commission,* 10 Cir., 110 F. 2d 350, reh. den., 113 F. 2d 1010, cert. den. 311 U.S. 693, 85 L.Ed. 449; *United Gas Pipe Line Co.* v. *Federal Power Commission,* D.C. Cir., 181 F. 2d 786, cert. den. 340 U.S. 827, 95 L.Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceeding is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal? Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

The Order Requires Filing of Changes in Rate Schedules

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for noncompliance, but this has an immediate effect in circumscribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

The Order Prohibits Automatic Contract Escalations

Here, without a doubt, the regulations promulgate a new and revolutionary policy having substantive consequences of great importance. For the Order, in connection with its requirements concerning the filing of rate schedules and changes in rate schedules, categorically states that contract escalations are a change of rate.[13] This has a substantial

[12] It should be borne in mind that questions of this type stated in emphatic terms are not to be taken as a conclusion that such Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

[13] Section 154.94 (Order 174 A): "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for initial service after June 7, 1954, shall constitute a change in rate schedule."

Substantially the same provision is contained in Section 154.94(c) of Order 174 B except that this Section has been made even more specifically

and immediate twofold impact: first, from a technical, procedural point of view, it has the effect of making the escalated rate a "new" or initial filing under Section 4(d)(e) with the complex problems of burden of proof and interim suspension flowing from that; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the agreements as made by them.

At the heart of both is the fact that, " • • • the Act, • • • evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates • • • may be set by individual contracts • • • The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. • • • By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, ... U.S. ...., ... L. Ed. .... [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas

applicable to price changes provided for in an "initial rate schedule." In addition, Order 174 B, Section 157.25, condemns, in advance, escalator clauses in producer contracts submitted in support of applications for Certificates which would, of course, affect interstate transmission pipeline companies, since long-term contracts for their essential gas reserves which have heretofore contained escalation clauses (see note 14 infra) could no longer contain them. This is thus a radical departure on a wide front from former substantive policies.

purchasers, interstate transmission pipeline companies in which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principle things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Investment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas, removes this from the dreaded vacuum. The Federal Power Commission in the Mississippi River Fuel Corporation case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississippi certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in suport of its proposed system expansion. The importance of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply', as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 * * *, 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assured over a sufficient period of years to justify the expenditures required for the construction of the proposed pipe-line project, and if that assurance of a continuing supply of natural gas meets the requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipe-line project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.'" The Commission then recited that they had prev-

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the opportunity of enjoying the general increase in the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made between seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of

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ically found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "* * * At the 1952 hearings Mississippi showed that it had entered into additional gas purchase contracts, covering the purchase of gas in the * * * Woodlawn gas fields in Texas * * *. These contracts are for primary terms of 20 years and provide prices ranging between 10.88¢ and 12.46¢ per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

business and to assert it by this Order subjects these parties to real and damaging and pressing results. It becomes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independent Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under no Governmental restraint or regulation, is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer, supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have

to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid — it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 Cases and the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against contract escalations be avoided or lessened by self-help,[15] since the customer (purchaser) of one of these producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance

[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. * * *" Columbia Broadcasting System, supra, 316 U.S. at 418, 86 L.Ed. at 1571.

with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a "change in the rate schedule." If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation

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[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee 15832), but which, for nearly two years, the Commission has thus far prohibited.

[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, * * *"

[18] United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 86 L.Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. §863 and cases there cited."

of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it, would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And

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19 "The powers of the Commission are defined by §§4(e) and 5(a). The basic power of the Commission is that given it by §5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by §4(e). All that §4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo * * * by suspending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." United Gas Co. v. Mobile Gas Corp., supra. [Italics by the Court]

20 The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

no further record proof or evidentiary facts is needed to make it ripe for judicial determination.

The Order Requires Application for Certificate of Public Convenience and Necessity

The Order Forbids Abandonment-Termination of a Sales Contract without Commission Approval

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case (defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

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21 Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall * * * file with the Commission an application * * *. (b) No independent producer of natural gas shall, * * * engage in any new service with respect to the * * * interstate * * * sale of such natural gas for resale in interstate commerce * * * without approval of the Commission, evidenced by a certificate of public convenience and necessity * * *" The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

22 Order No. 174 A provided: Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained * * *."

In Order No. 174 B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: *"Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative action taken indicates that in the administrative application by the Commission there is no difference between 174 B and 174 A for sales are considered "service rendered by * * * such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see J. M. Huber Corp. and Northern Natural Gas Co. v. J. M. Huber Corp., Dockets No. G-4326 and G-4957, Federal Power Commission v. J. M. Huber Corp., D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); Skelly Oil Co. and Lone Star Gas Co. v. Skelly Oil Co., Dockets No. G-5380 and G-5260; Argo Oil Corp., et al, Dockets No. G-6810, G-6811, G-2591 and G-2950.

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the individual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21(a)) for "wilfully and knowingly" doing an act "declared to be unlawful", or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Section 21 (b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts, the seller (producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-

help — that is, termination — is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility — a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn* v. *People of the State of Illinois,* 94 U.S. 113, 24 L.Ed. 77; *Wolf Packing Co.* v. *Court of Industrial Relations,* 262 U.S. 522, 67 L.Ed. 1103. All persons dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[23]

There is even greater doubt concerning the right to forbid

[23] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of proposed facilities: "No natural-gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was entering a "market in which natural gas is already being served by another natural-gas company * * *." As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction,* see hearings on H.R. 5249, 77th Congress, page 15 et seq.

or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The Congressional purpose[25] to restrict the prohibition against abandonment to services rendered by jurisdictional facilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct

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24 Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities * * *." [Italics mine]

25 The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, §305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company * * * shall discontinue service * * *," but this was rejected and language of present §7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers * * *" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act, contained the language now found in §7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission * * *."

26 By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear "* * * that the Commission is authorized to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress, 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L. Ed. 1499.[27]

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases — that is, the right to the gas — because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

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[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * *. In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 89 L.Ed. 1206 * * * we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'life-blood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'" Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, at 337 U.S. 504-509, 93 L.Ed. 1504-1507. And see Colorado Interstate Gas Co. v. Federal Power Commission, supra, Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 91 L.Ed. 1742; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L.Ed. 333, approved expressly in the Phillips decision.

The Order Compels Other Action

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a roll-back of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive and judicial functions compels or suggests that review should be postponed.

II.

SUSPENSION CASES

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores

the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.[28]

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Admin-

[28] Federal Power Commission v. Hope Natural Gas Company, supra; State Corporation Commission of Kansas v. Federal Power Commission, 8th Cir., 215 F.2d 176; Hope Natural Gas Company v. Federal Power Commission, 4th Cir., 134 F.2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission * * * As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

istrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because if forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem — an illegal suspension order — was presented in *Atlantic Seaboard Corporation* v. *Federal Power Commission,*[29] 4th Cir., 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company* v. *Federal Power Com-*

[29] To the familiar lament from the Commission, the Court stated at 201 F.2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

mission,[30] 10th Cir., 227 F. 2d 470. See also, *Isbrandtsen Co., Inc.* v. *United States*, D.C. Cir., 211 F. 2d 51, cert. den. 347 U.S. 990, 98 L.Ed. 1124; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 1st Cir., 201 F. 2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotyped suspension orders magnified in several instances by other stereotyped denials of rehearing and whether such rubber-stamped treatment met the demands of the statute that the Commission, in suspending, shall

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[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See Atlantic Seaboard Corp. v. Federal Power Commission, 4th Cir., 201 F.2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to etsablish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviewable." 227 F.2d at 474.

[31] See Amarillo-Borger Express v. United States, N.D. Tex., 138 F.Supp. 411, expressly approved and followed in Long Island Railroad Company v. United States, E.D.N.Y. [Civil Action 16321, May 9, 1956] ..... F. Supp. ....., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, United States v. Storer Broadcasting Co., supra.

deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension", Section 4(e); *Amarillo-Borger Express* v. *United States, supra,* and *Long Island Railroad Company* v. *United States, supra.* And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same wells, the Commission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

III.

ABANDONMENT CASES

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract right to select his own purchaser and conclude a gas sales agreement with that new purchaser. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of imme-

diate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[32]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the gas to the new purchaser. If, on the analysis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

IV.

STATE TAX ESCALATION CASES

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine

[32] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filings. Mississippi River Fuel Corp. v. Federal Power Commission, 3 Cir., 202 F.2d 899.

until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from September 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment, that there was intended significance in what appears to me to be inadvertent scrivener errors made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 L.Ed. 626; *Stark* v. *Wickard*, 321 U.S. 288, 80 L.Ed. 733; see also, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 512, 92 L.Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no affect or impact.

I therefore respectfully dissent.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15320

MAGNOLIA PETROLEUM COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15321

THE OHIO OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15352

THE SUPERIOR OIL COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

No. 15354

WESLEY WEST,
Petitioner,

versus

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission, sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES, and BROWN, Circuit Judges.

BORAH, Circuit Judge: These are separate but companion cases and since they involve substantially similar facts and the same issues of law and come to us on one record they may conveniently be disposed of in one opinion. All of the petitioners herein have invoked the jurisdiction of this Court, under Section 19(b) of the Natural Gas Act, 15 U.S.C.A. 717r(b), to review certain orders of the Federal Power Commission which petitioners seek to have set aside, vacated and nullified. And all, save Ohio Oil Company, also claim that this Court is empowered under Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 1009, to review the action of the Commission in issuing said orders.

It is believed that a history of the occurrences which give rise to these petitions for review will be helpful to an understanding of the questions involved. On June 7, 1954, the Supreme Court rendered its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, holding that Phillips, a natural-gas producer and gatherer, was a "natural-gas company" within the meaning of that term as defined in the Natural Gas Act, and that certain of its admitted sales in interstate commerce of natural gas for resale were subject to the jurisdiction of and regulation by the Federal Power Commission.[1] This decision was contrary to the Federal

[1] Section 1(b) of the Natural Gas Act, 15 U.S.C.A. 717(b), provides: "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . . or to the production or gathering of natural gas."

Power Commission's prior interpretation of its jurisdiction over such activities,[2] and its immediate impact was to charge the Commission with the regulation of a great number of hitherto unregulated jurisdictional sales. Thus confronted with numerous practical considerations in adjusting its activities to the Court's interpretation of its regulatory sphere, the Commission on July 16, 1954, without prior notice of hearing, issued its order 174 amending and supplementing its long-existent rules and regulations under the Natural Gas Act, 18 C.F.R., Chapter 1, Subchapters A and E through G. These original rules were directed principally to interstate pipeline companies, but since by their terms they speak only of "natural-gas companies,"[3] the Commission concluded that save for the issuance of Order 174, they would have been applicable also to jurisdictional sales in the production and gathering portion of the natural-gas business.[4]

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[2] See 18 C.F.R. 2.54(b) which, prior to its being rescinded by Order No. 154, July 20, 1950, provided: "For the purpose of administering the Natural Gas Act, the Commission will construe the exemption contained in Section 1(b) [15 U.S.C.A. 717 (b)], to the effect that the provisions of the act shall not apply to the 'production or gathering' of natural gas, as including arm's length sales of natural gas, by independent producers and gatherers, made during the course or upon completion of production and gathering. . . ."

[3] A "natural-gas company" is defined in Section 2(6) of the Natural Gas Act as ". . . a person engaged in the transportation of natural gas in interstate commerce, *or the sale in interstate commerce of such gas for resale.*" *15 U.S.C.A.* 717a (6). (Italics ours.)

[4] The prefatory statement in Order No. 174 reads in part as follows:

"The rules and regulations heretofore adopted by the Commission pursuant to Sections 4 and 7 of the Act have been directed *principally* to interstate pipeline companies. *Those* producers and gatherers which come within the class found by the *United States Supreme Court in the Phillips case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act,* to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a *reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions. Therefore, we have determined to provide* in the first instance, and subject to our further order, *reasonably simply rules and regulations applicable to these companies.* For these and other reasons, good cause exists for making the rules and regulations herein adopted effective on less than 30 days' notice and for making such rules and

The Commission's long-established rules, as well as Order 174, were issued under the rule-making authority vested in the Commission by Section 16 and were designed to implement Sections 4, 7, and 8 of the Act.[5] Order 174 prescribed rules and regulations applicable only to "independent producers," that is, natural-gas companies in the producing and gathering area of the business, and they were therein defined as "any person . . . who is engaged in the production and gathering of natural gas and who transports . . . or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline." Among other things these rules and regulations prescribed the procedure to be followed by all independent producers, who, on or since June 7, 1954, had engaged in the interstate transportation or sale of natural gas subject to the Act, by providing that they were

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regulations applicable to transactions and operations conducted on and after June 7, 1954, the date of the Supreme Court decision in the Phillips Petroleum Company case.

"Although the decision of the Supreme Court is, of itself, notice to all 'independent producers', as hereinafter defined, of their responsibilities and duties under the Natural Gas Act, the Commission recognizes that there may be areas of uncertainty and there may be a few situations where independent producers have, in good faith, endeavored to invoke a price increase provided in a sales contract executed prior to June 7, 1954, or in good faith taken other steps since said date without Commission approval which require the same.

"Of course, any action which requires Commission approval under the law is not effective without it. The Commission will do all it can to assist in adjusting any such matters, without unnecessary punitive action, to the end that all independent producers will receive like treatment as of June 7, 1954, henceforth." (Italics ours.) 19 Federal Register 4535.

[5] Section 4(c) of the Natural Gas Act requires every natural-gas company to file with the Commission schedules of its rates and charges in such form as the Commission may designate and prescribe in its regulations. Section 4(d) prohibits, with certain exceptions, changes in rates except after 30 days' notice to the Commission and the public. Section 7(b) forbids the abandonment of facilities or service without the permission and approval of the Commission first being obtained. Section 7(c) prohibits engagement in operations subject to the Commission's jurisdiction unless a certificate of public convenience and necessity has been obtained from the Commission. Section 7(d) requires that applications for certificates be filed in such form, and notice thereof given, as the Commission may require. Section 8(a) authorizes the Commission to prescribe a system of accounts and classification of companies, and requires every natural-gas company to conform its accounts thereto.

to: (1) file on or before October 1, 1954, their rate schedules in force on June 7, 1954, and the contracts effective as of June 7 were permitted to be filed as such "rate schedules"; (2) make no changes in the June 7, 1954, rates except after thirty days' notice to the Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering the sale of such gas as is subject to the jurisdiction of the Commission; and (4) continue any sales or services rendered until termination was given the express approval of the Federal Power Commission in accordance with Section 7(b) of the Act. The Commission contends that the rules and regulations provided by Order 174 were formulated with these fixed objectives in view: (a) to relieve independent producers of accounting requirements and the maintenance of accounts under the Commission's Uniform System of Accounts; (b) to provide for simplified filing of gas sales contracts instead of converting such contracts into tariff form before filing and for simplified rate change procedures; and (c) to provide for simplified requirements and limited data in support of applications for certificates of public convenience and necessity.

Thereafter and upon further consideration, the Commission on its own motion amended and modified Order 174 by the superseding Order 174-A which was issued on August 6, 1954. Following the action of the Commission, petitioners in company with more than one hundred other persons and corporations applied for a rehearing and stay of Order 174-A. In their applications the validity of the order was challenged on numerous grounds, and, with the exception of Ohio Oil Company, each of the petitioners in its application for rehearing sought to have the Commission make a separate jurisdictional finding that it was not a "natural-gas Company" within the meaning of that term

as defined in the Natural Gas Act. By an order issued on September 8, 1954, the Commission afforded all applicants who had questioned the lawfulness of Order 174-A an opportunity to submit briefs and oral argument on the applications for rehearing, but denied all requests for stay, assigning as reasons therefor the following:

> "In the absence of the rules provided by Order No. 174-A, the more stringent rules generally in effect and applicable to all natural-gas companies would be applicable to producers and gatherers who are also natural-gas companies under the Natural Gas Act (18 CFR, Chap. I, Parts 154 and 157). Accordingly, request for stay of Order No. 174-A is without reasonable justification and must be denied." 19 Federal Register 5952.

After the filing of briefs and after oral arguments were had, the Commission, on September 24, 1954, amended Order 174-A in a respect immaterial to the petitions here, and extended the time for compliance with the regulations prescribed therein from October 1 to December 1, 1954, but took no further action at that time on the applications for rehearing. Following this action by the Commission, each of the petitioners herein filed in this Court a petition for review requesting a stay of Order 174-A pending final hearing on their petitions for review. Stays were granted to Magnolia Petroleum Company and to Ohio Oil Company, but not to either Superior Oil Company or Wesley West.

On December 17, 1954, which was subsequent to the time when true and correct copies of the documents reflecting all of the action taken by the Commission in issuing Orders 174 and 174-A had been certified and filed in this Court, the Commission further amended Order 174-A and expressly denied all applications for rehearing thereof. The revised sections were published together with the unchanged por-

tions of that order and the order as so revised was designated as Order 174-B.[6] Thereupon Magnolia filed a supplemental petition for review in which it directed against Order 174-B all objections which it had previously made against Order 174-A. Superior by way of a responsive pleading likewise requested that its original petition be considered as directed against and as equally applicable to both orders. In the meantime the Commission had filed motions to dismiss against Magnolia and Ohio and had moved to vacate the stay orders which had been granted to those petitioners, but no motions to dismiss were filed as to Superior and Wesley West.

At the outset is should be noted that the Commission urged no objection to this Court's considering the two supplemental requests for review of Order 174-B. While we are of opinion that the ultimate result in these cases will not be affected in the slightest degree by our consideration of Order 174-B, we are nevertheless and by virtue of Section 19 of the Natural Gas Act expressly precluded from considering petitioner's objections thereto for the reason that they have not been previously presented to the Commission in a petition for rehearing. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498. Accordingly, we shall confine our discussion to Order 174-A.

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[6] In this order the Commission also made it clear that the purpose of the order was not to determine status when it stated:

"* * * A number of petitions for rehearing urge that the Commission redefine independent producers so as to make more precise the applicability of the statute and rules to those persons brought within the scope of the Act by the decision of the United States Supreme Court in Phillips Petroleum Company v. Wisconsin, et al., 347 U.S. 672. We recognize the desirability for clarification of jurisdiction in the light of the Phillips decision. This is of serious concern to many independent producers and clarification is desirable not only to prevent unnecessary filings, but to assist those persons having honest doubt as to whether they come under statute. We have no desire to extend our jurisdiction beyond statutory limits. This problem is substantive and not procedural and cannot be dealt with here. Hearings are scheduled and will be concluded at the earliest practical time in order to facilitate prompt determination of jurisdictional questions."

In their petitions for review of Order 174-A, petitioners assert that the order is reviewable, and although they deny that they are "natural-gas companies," petitioners nevertheless insist that they are "independent producers" within the definition of the order and as such they have standing to petition for review. As grounds for vacating, setting aside and nullifying the order, they set forth numerous specifications of error[7] in which they contend that its formulation and substance violate in certain particulars their rights under the Fifth and Tenth Amendments to the Constitution of the United States, and were contrary to the provisions of the Natural Gas Act and the Administrative Procedure Act. In addition they uniformly contend that although Order 174-A purports to be procedural in form, it is actually final and adjudicatory in that it requires and inhibits certain actions, violates their substantive rights and causes them irreparable injury, all of

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[7] The divers specification of error, most of which are common to all petitioners though not identically phrased or bottomed upon the selfsame reasons, are substantially as follows:

1. Order 174-A was issued without hearing and without any findings by the Commission of facts based on evidence in support thereof, all in violation of and contrary to the Administrative Procedure Act and Natural Gas Act.

2. The order was issued without notice thereof and without valid or reasonable grounds being given for the waiver of notice, all as required by the Administrative Procedure Act.

3. The order does not allow petitioner sufficient time to comply without causing an undue hardship; and it deprives petitioner of the right to examine the officers of its purchasers regarding the volume of gas purchased which will be transported in interstate commerce.

4. The order, in effect, attempts to regulate the production and gathering of gas by petitioner and others, although under the Natural Gas Act such operations are specifically excluded from the jurisdiction of the Commission.

5. The order, if enforced, would deny the right to petitioner to determine by its own judgment whether it will or will not further operate in the production and sale of natural gas and the delivery thereof to pipe lines, for transmission in interstate commerce, and whether it will or will not be subject to regulation by the Commission and submit any of its business affairs and operations to the Commission's control.

6. The order, attempting to fix prices under petitioners' contracts as of June 7, 1954, and prohibiting any increase thereof, is arbitrary and unreasonable and in violation of the Commission's statutory authority for the fixing of rates or the setting aside of existing rates; and the order, insofar as it purports to so fix rates and insofar as it attempts to prohibit the increase

which, under the authority of *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, make the order subject to review in this Section 19(b) proceeding. In the alternative, they contend that if the order does consist only of procedural rules and regulations, it is nonetheless void for the reason that before the order was adopted petitioners were not accorded the notice and hearing to which they were entitled under the Natural Gas Act and the Administrative Procedure Act.

The Commission on the other hand vigorously insists that this Court has no jurisdiction to entertain the petitions for review (1) because petitioners have not exhausted the administrative remedies which are available to them; (2) because petitioners are not "aggrieved" by the order; and, (3) because Section 19(b) of the Natural Gas Act does not provide for review in this Court of

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of prices for gas sold by petitioner under its contracts, is in further violation of the satutory authority of the Commission.

7. The order, if enforced, would result in taking petitioner's property without due process of law; and said order would further operate as an arbitrary and unreasonable restraint on and denial of petitioner's liberty of contract, all in violation of the Fifth Amendment to the Constitution of the United States.

8. The Commission has heretofore in various dockets approved the contracts which petitioner has entered into with purchasing companies who may move such gas in interstate commerce. In granting certificates of public convenience and necessity to the purchasing companies the Commission cannot change the rate, charge or classification provided in such contracts without first granting petitioner a hearing with respect thereto as is provided in the Natural Gas Act.

9. The order, insofar as it attempts or purports to require petitioner to apply for certificates of public convenience and necessity, to continue with its operations and the sale of natural gas for transmission in interstate commerce, and, insofar as it purports to forbid petitioner discontinuing any service being rendered on the date thereof for the sale of natural gas, is further in violation of the Fifth Amendment to the Constitution of the United States in that it would take petitioner's property without due process of law and would also take petitioner's private property for public use without just compensation.

10. The order, insofar as it purports to prohibit the discontinuance of production by petitioner of any gas or the deliveries thereof, or from decreasing the amount of gas being delivered, or insofar as it requires production and delivery of gas in any quantities, is contrary to and invades the rights reserved to the States for the regulation and conservation of natural resources by State authority; and the order, therefore, is in violation of the Tenth Amendment to the Constitution of the United States.

orders which merely promulgate procedural rules of general applicability.

We agree with the Commission that Order 174-A is not judicially reviewable under Section 19(b) for the reason that it is not an "order" which satisfies the distinctive and controlling conditions to bring it within the purview of the statute. By Section 19(b) Congress formulated the exclusive conditions under which resort to this Court may be had when it provided that: "any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals . . ." This language of the statute does not authorize a review of *every* order that the Commission may make and the context of Section 19(b) makes clear the nature of the orders which are reviewable in this Court by requiring that, upon service of the petition for review, the Commission is to certify and file with the Court of Appeals, "a transcript of the record upon which the order complained of was entered." The review provisions of Section 19(b) thus relate solely "to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." *Federal Power Commission* v. *Metropolitan Edison Co.* 304 U.S. 375, 385;[8] *United Gas Pipeline Co.* v. *Federal Power Commission*, D.C. Cir., 181 F. 2d 796, 798-799, cert. den. 340 U.S. 827. It is therefore clear from the language employed as it is from the authorities that the statute in terms contemplates review by this Court of definitive orders entered after hearing and upon completion of the administrative process. Applying this test to Order 174-A it is clear that it did not

[8] The review provisions of the Natural Gas Act and the review provisions of the Federal Power Act which were at issue in the *Metropolitan Edison* case are identical in all pertinent respects. See 16 U.S.C.A. 825 l.

result from such a hearing upon evidence, and the regulations prescribed therein do not constitute "findings." Indeed under the rule-making power granted in Section 16 of the Act, there was no requirement for either notice or hearing prior to the issuance of such regulations. So, irrespective of any label placed upon it by the Commission or the petitioners, we think it plain that the Commission has simply promulgated regulations of general applicability and not an order reviewable under Section 19(b). The order does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a "natural-gas company" or an "independent producer." The definition of the latter as set forth in the order merely enunciates a classification of certain types of "natural-gas companies," but such a classification in a general regulation does not subject any person or corporation to the Commission's jurisdiction. If persons whose sales of natural gas are such as to bring them within the Commission's jurisdiction, this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question. Furthermore, Order 174-A is not a formal determination of any right or obligation; it is not self-executory and it does not command these petitioners to do or refrain from doing anything. The construction of the regulations and their application in particular situations is still in the hands of the Commission, and this being so we cannot under the limitations of Section 19(b) sit in judgment upon practical business consequences where the action to be reviewed does not represent a definitive ruling resulting from a hearing upon evidence. In fine, and as was pertinently pointed out in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 130, an order is not subject to review if it "does not of itself adversely affect complainant but only affects his rights

adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province."

Much of the argument in these cases is centered around the proposition that Order 174-A is reviewable under Section 19(b) by virtue of the fact that the order requires and inhibits certain actions by the petitioners and has the immediate impact of the sort which led the Supreme Court in *Columbia Broadcasting* v. *United States, supra,* to regard particular administrative action as ripe for judicial review. This argument presupposes that a parallel can be drawn between the order complained of in the *Columbia Broadcasting* case and the order sought to be reviewed here and that petitioners are entitled to the same relief under Section 19(b) as was afforded to appellant in *Columbia Broadcasting* under the review provisions of the Federal Communications Act. The argument is not persuasive. As we have previously said these regulations do not change petitioners' existing or future status and do not subject them to the Commission's jurisdiction. Order 174-A is not a formal determination of any right or obligation, is not self-executory, and does not command these petitioners to do or to refrain from doing anything. Whereas, in the *Columbia Broadcassting* case the very existence of the regulations had, without anything more, an immediate effect on the business of the party attacking them. Furthermore, reviewability under Section 19(b) is not equated with irreparable harm, and is not governed by the same tests as reviewability under Section 402(a) of the Federal Communications Act. Section 402(a), prior to its amendment in 1952, made applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" except orders

"granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operators license." Review of the orders excepted from the provisions of Section 402(a) was by appeal to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) and the review in the Court of Appeals was to be heard upon the record made at the hearing of an application by the Commission. In the *Columbia Broadcasting* case it was not contended by the parties that the controverted order promulgating licensing regulations was a Section 402(b) order and indeed it was not one. The three-judge District Court in its consideration of the questions there presented determined that it had no jurisdiction to hear the complaint brought by Columbia Broadcasting System for the reason that it did not view the order in question as an "order" within the meaning of Section 402(a). The reasons set forth were that if any of the plaintiffs should thereafter apply for a renewal of licenses and the Commission then adhered to the policy ennunciated in the order in question, "the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing . . . Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues . . . Whatever may ordinarily be the proper scope of the word 'order' in the Act . . ., it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such 'orders'."[9] The questions thus posed to the

[9] *National Broadcasting Co.* v. *United States*, 44 F. Supp. 688, 692.

Supreme Court on appeal from this decision were: (1) whether the order in question was an "order" within the meaning of Section 402(a), and (2) if it was such an order, whether the bill stated a cause of action in equity. Considerable doubt had been cast by the lower court's decision as to whether the issues raised in the complaint were relegated to review only after the entry of a Section 402(b) order in which the Federal Communications Commission had effectuated its announced licensing policy. In reversing the three-judge court the Supreme Court concluded that Congress had not precluded a review of these issues under Section 402(a), and held that the order there in question was a reviewable order within the meaning of that section and that the bill of complaint stated a cause of action in equity. In our view the *Columbia Broadcasting* decision adds nothing to petitioners case for review for the Supreme Court decided not whether the order was one subject to review in a court of appeals, but only that the order was an "order" which could be attacked in a district court of three judges in a suit which states a cause of action in equity. Whether, as was suggested by some of the petitioners, Section 19(b) precludes injunction proceedings in a district court to restrain the enforcement of Order 174-A is not properly before us and consequently we need not resolve the apparent conflict in the authorities which bear upon this question.[10]

Having concluded that the orders in question are not reviewable under Section 19(b) of the Natural Gas Act, there remains for discussion the contention of three of the petitioners that we have jurisdiction to review their peti-

[10] See *Federal Power Commission, et al* v. *Union Producing Company*, D.C. Cir., ... F. 2d ....., cert den.; *United Gas Pipeline Co.* v. *Federal Power Commission, supra*, ... F. 2d .....; *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 3 Cir., 124 F. 2d 800; *East Ohio Gas Co.* v. *Federal Power Commission*, 6 Cir., 115 F. 2d 385; *Carolina Aluminum Co.* v. *Federal Power Commission*, 4 Cir., 97 F. 2d 435.

tions under Section 10 of the Administrative Procedure Act. For answer we deem it sufficient to say that we are of opinion that the latter Act adds nothing to our jurisdiction under the Natural Gas Act, Section 10 of the Administrative Procedure Act provides that its provisions are applicable "except so far as (1) statutes preclude judicial review . . ." and the Supreme Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, characterized Section 19(b) as one of the statutes precluding judicial review within the meaning of that section.

In the light of the foregoing and since we hold that we have no jurisdiction to review the regulations in question at this time the other contentions raised by the parties, all of which have been carefully considered do not merit further discussion. Accordingly, separate judgments will be entered in each of these cases dismissing the petitions for review for lack of jurisdiction.

BROWN, Circuit Judge, dissenting.

United States Court of Appeals for the Fifth Circuit

JUDGMENT

Extract from the Minutes of June 30, 1956

HUMBLE OIL & REFINING COMPANY,

versus

No. 15704

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Humble Oil & Refining Company for a review of an order of the Federal Power Commission, entered on May 19, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.

"Brown, Circuit Judge, dissenting."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORDER DENYING REHEARING

Extract from the Minutes of August 21, 1956

HUMBLE OIL & REFINING COMPANY,

No. 15704

versus

FEDERAL POWER COMMISSION.

As neither of the judges who concurred in the decision of the court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be, and the same is hereby, DENIED.

"Brown, Circuit Judge, Dissents"

EXCERPT FROM THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

EXCERPT FROM THE NATURAL GAS ACT

"Rates and Charges; Schedules; Suspension of New Rates

Sec. 4.

* * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without re-

quiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ord-

ered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

Fixing Rate and Charges; Determination of Cost of Production or Transportation

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in

accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * *

Rehearing; Court Review of Orders

Sec. 19 * * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce addi-

tional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

* * *"

EXCERPTS FROM TITLE 18, CODE OF FEDERAL REGULATIONS

Subchapter A, General Rules, Chapter I of Title 18, Code of Federal Regulations

"PART 2 — GENERAL POLICY AND INTERPRETATIONS

§ 2.4 *Suspenson of rate schedules.* The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act: [Federal Power Act, 49 Stat. 860, 16 U.S.C. 8251]

* * * * * * *

(d) An initial rate schedule cannot be suspended.

* * * * * * *

§ 2.52 *Suspension of rate schedules.* The Commission, in approving and adopting the interpretation stated in § 2.4, applied it also to the suspension of rate schedules under section 4 of the Natural Gas Act."

Subchapter E, Regulations Under the Natural Gas Act, Chapter I of Title 18, Code of Federal Regulations

"PART 154 — RATE SCHEDULES AND TARIFFS

* * * * * * *

§ 154.92 *Filing of Rate Schedules by Independent Producer.* — (a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale

effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

• • • • • •

§ 154.93 *Rate Schedule Defined.* — For the purpose of Section 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

§ 154.94 *Changes in Rate Schedules.* — (a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

* * * * * * *

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 530

HUMBLE OIL AND REFINING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The orders of the Federal Power Commission (R. 71–73, 89) are not reported. The opinion of the Court of Appeals (Pet. App. 1–45) is reported at 236 F. 2d 819.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (Pet. App. 61). A petition for rehearing, timely filed, was denied on August 21, 1956

[1] The opinion of the court below in *Magnolia Petroleum Co.* v. *Federal Power Commission*, relied on by the court in this case, is reported at 236 F. 2d 785. Judge Brown's dissenting opinion in both this case and *Magnolia* is reported at 236 F. 2d 793.

(Pet. App. 62). The petition for a writ of certiorari was filed on October 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Whether an order of the Federal Power Commission, setting a hearing on a rate increase proposed by an independent producer of natural gas and suspending the rate increase pending the hearing in accordance with Section 4 (e) of the Natural Gas Act, is reviewable under Section 19 (b) of the Act where the Commission has neither held the hearing nor finally passed on the propriety of the proposed increase.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the Natural Gas Act and the Federal Power Commission regulations are set forth in Petitioner's Appendix at pp. 63–70.

STATEMENT

In this case, the Federal Power Commission, acting pursuant to Section 4 (e) of the Natural Gas Act, ordered a hearing to determine the legality of a proposed rate increase filed by petitioner, an independent producer of natural gas, and pending such hearing suspended the increased rate. Without awaiting the Commission's final determination as to the proposed increase, petitioner sought review of the suspension order in the Court of Appeals below. That court held that the suspension order was interlocutory and unreviewable under Section 19 (b) of

the Natural Gas Act, prior to the issuance by the Commission of a final order made after a hearing on the proposed increase (Pet. App. 1–8). The pertinent facts may be summarized as follows:

In February 1954, petitioner, an independent producer of natural gas, contracted to sell United Gas Pipe Line Company natural gas produced by it for a period of nineteen years (Pet. App. 1, 2). On June 7, 1954, this Court entered its decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672, holding that sales by independent producers of natural gas for resale in interstate commerce are subject to the provisions of the Natural Gas Act. In August 1954, the Commission issued Order No. 174–A (19 F. R. 5081) which provided a simplified procedure whereby independent producers subject to the Act were to file schedules of their June 7, 1954, rates as their initial rate schedules under the Act (Pet. App. 68–70). Pursuant to this order, petitioner, under protest, filed its United contract as an initial schedule in September 1954.

In accord with long-standing Commission practice, Order No. 174–A also provided that periodic changes in rates made pursuant to escalation clauses in existing contracts constituted changes in the rate schedule and should be filed as rate changes under Section 4 (d) of the Act (Pet. App. 70). Since its United contract provided that the rate was to increase from 13.5 to 14.5 cents per Mcf on June 1, 1955, petitioner filed this rate increase, also under protest, on April 21, 1955 (Pet. App. 3). The Commission, on May 19,

1955, ordered a hearing into the legality of the increased rate and, pending the hearing, suspended the filing (and thereby the effectiveness of the increase) for the five month period provided in Section 4 (e) of the Act. (Pet. App. 64–65). The suspension terminated on November 1, 1955, when the increased rate went into effect pursuant to a bond submitted by petitioner as provided in Section 4 (e).

ARGUMENT

Petitioner's substantive claim is that the Commission's order setting a hearing and suspending the June 1, 1955 rate increase was wholly invalid; the ground for this position is that, since the increase was provided for in a contract filed as an initial rate schedule, the increase itself was a part of the initial rate schedule and so was not suspendible under Section 4 (e) of the Natural Gas Act. Contending that this allegedly invalid suspension will cause it irreparable injury, petitioner urges that, despite its interlocutory character, the suspension order is reviewable at this time, prior to the hearing and Commission's decision, under Section 19 (b) of the Act. There is no merit to this position.

1. The basic premise of petitioner's contention that the Commission had no power to suspend its rate increase—because the increase was made pursuant to an escalation clause of a contract already filed as an initial rate schedule, and hence was part of this initial rate schedule which could not be suspended under Section 4 (e) of the Natural Gas Act—is identical to that made in *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F.

2d 726. The Tenth Circuit rejected this contention (233 F. 2d at 730, 731) and this Court recently denied certiorari, No. 418, this Term. It is clear, in any event, that the requirement that independent producers comply with Section 4 (d)—governing rate changes—in undertaking to make contract-provided rate changes, far from being an innovation, merely applies to the independent producers the practice consistently followed by the Commission in regard to pipeline companies since the beginning of gas regulation. The law is settled that changes contemplated by contract can become effective only in the form of changes in existing schedules, as required by Section 4 of the Act. See the Commission's briefs in opposition in *Cities Service Gas Producing Co.* v. *Federal Power Commission,* No. 418, this Term and in *Continental Oil Co.* v. *Federal Power Commission,* No. 457, this Term; *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F. 2d 388 (C. A. 5); cf. *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 121 F. (2d) 159 (C. A. 8). No other procedure would permit the Commission to fulfill its obligation to determine whether changes in existing rates, whether proposed by pipeline companies or independent producers, were unjust or unreasonable.

Thus, petitioner's basic reason for challenging the suspendibility of its proposed increase is wholly without merit. Regardless of whether suspension orders are or are not reviewable, there is therefore no occasion for the Court to consider this case.

2. Not only is petitioner's assertion as to the invalidity of the suspension order contrary to well

settled principles, but its claim of irreparable injury from the suspension order is likewise without merit. The fact is that petitioner's contention regarding the Commission's action on the proposed rate increase, if valid, permeates the *entire* Commission proceeding, not the suspension order alone.

As the court below pointed out, "upon judicial review of the definitive order, the interlocutory order will be reviewable insofar as it may have affected the final order" (Pet. App. 7). Compare *Northern Natural Gas Co.* v. *Federal Power Commission*, C. A. D. C. No. 10726 (decided February 8, 1951) (unreported) with *State Corp. Commission of Kansas* v. *Federal Power Commission*, 206 F. 2d 690, 698 (C. A. 8), certiorari denied, 346, U. S. 922.[2] Consequently,

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[2] In *Northern Natural*, a natural gas company sought review, as petitioner does here, under Section 19 (b), of a Commission suspension order. The suspension there was of proposed rate increases allegedly covering sales of natural gas for resale for industrial use only, which rates are nonsuspendible under Section 4 (e). The District of Columbia Circuit, after argument, dismissed the petition for want of jurisdiction, in an unpublished opinion. Subsequently, when the Commission, after hearing, had passed on the validity of the increased rates, the company sought review in the Eighth Circuit of the validity of the suspension order as well as the Commission's rate determinations, as provided by Section 19 (b). That court, in *State Corporation*, *supra*, after a thorough consideration of the record made before the Commission, held that there was "no error in the Commission's exercise of jurisdiction in suspending the proposed schedules" (206 F. 2d at 698–702). These decisions provide a graphic example both of the necessity and the utility of the requirement of Section 19 (b) that review of Commission interlocutory orders should await the availability of a full record prepared before the Commission.

The District of Columbia Circuit, on November 15, 1956, followed *Northern Natural* by dismissing, in a *per curiam*

if the Commission finally determines that it lacks jurisdiction to suspend the proposed increase, or if a court should reverse an adverse Commission determination, the result will be that, since the suspension would be shown to be invalid, the increased rate will have been the "filed" rate from the date on which petitioner asked that it be effective and petitioner would not be precluded from collecting the full amount of the increase from United.[3] It follows that petitioner stands to lose the benefit of its rate increase during the suspension period only if its increased rate *is* subject to the filing requirements of Section 4 (d). In these circumstances, however, not only would petitioner's present attack on the suspension order fall as completely without merit, but the denial of the increase during the suspension period would not be irreparable injury, but rather only "a necessary incident of rate regulation." See *infra*, pp. 7 *ff*.

3. (a) It is clear, in any event, that a Section 4 (e) suspension is normally interlocutory in character,

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opinion, as outside the scope of Section 19 (b), a petition for review of another Commission suspension order where it was also claimed that the Commission had no jurisdiction over the suspended rate. *Columbian Fuel Corp.* v. *Federal Power Commission*, C. A. D. C., No. 13129 (decided November 13, 1956).

[3] Petitioner's assertion that requiring it to await a final order before seeking review of the suspension will cause irreparable injury, in view of the Commission's lack of reparation authority, proves too much The suspension period (which was to run for 5 months beginning June 1, 1955) has now expired; the logical application of petitioner's theory would mean that, even if the suspension order was reviewed and set aside in this proceeding, petitioner could not recover the amount of the increase for the suspended period.

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and so not reviewable, at least in the absence of true irreparable injury, under Section 19 (b) of the Natural Gas Act.

Section 4 (e) of the Act (Pet. App. 64) provides that:

> Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule * * * but not for a longer period than five months * * *.

This provision clearly contemplated that the suspension is but a procedural step at the inception of the administrative process whereby the Commission may preserve the status quo for the limited period of five months pending the Commission's investigation into the lawfulness of the proposed increase. Thus, Section 4 (e) represents a deliberate decision by Congress to place upon the natural gas company the burden, such as it might be, of maintaining its existing rates for a reasonable time after it files an increase, to give the Commission an opportunity to determine whether the proposed rate complies with the statutory requirements. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 341; *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C. A. 4). The gas company in turn is protected by the fact that

the suspension is limited to five months, after which the new rate goes into effect, subject to the company's posting a bond if required by the Commission. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra.* Any loss suffered as a result of the five months' suspension must be "properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not 'overpass the bounds of reason' ". *Hope Natural Gas Co.* v. *Federal Power Commission, supra,* at 809. See *American Telephone & Telegraph Co.* v. *United States,* 299 U. S. 232, 247; *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U. S. 464, 475. As the Fourth Circuit stated in *Hope* (196 F. 2d at 808, 809):

> * * * With changes in economic conditions rates must be changed from time to time, and the lag which necessarily accompanies the making of changes may result to the benefit of the utility as well as to its detriment.
>
> * * * * *
>
> It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. * * *

Since Nov. 1, 1955, petitioner has been collecting the increase under bond and the Commission's action has resulted in loss to it, if at all, only for the five months' suspension period. Plainly, this "necessary

incident of rate regulation" does not create a right in the company to obtain review of the suspension order.

(b) Petitioner (Pet. 12, 13) claims, however, that the Commission had no authority to investigate into the reasonableness of the rate increase under Section 4 (e) and that the Commission, accordingly, is without power to suspend the proposed increase provided for in the escalation clause. On this reasoning, petitioner concludes that it thereby obtains a right to immediate review of the Commission's suspension order. As we point out above (pp. 4–5), petitioner plainly errs in its argument that the Commission lacked authority to suspend the proposed increase. But putting that aside, the claim is still unsound. The very purpose of the Section 4 (e) suspension power was to provide time for hearings and deliberation before a new rate went into effect, and the suspension order is a necessary preliminary to the Commission's determining not only the reasonableness of the rate but also of the extent of its statutory authority.

Viewed in the context of these considerations, petitioner's argument is reduced to the claim that a suspension order issued by the Commission in a proceeding where the Commission's action is challenged is immediately subject to judicial review notwithstanding its interlocutory character. Such a claim, however, cannot be reconciled with the language and the "manifest purpose" of Section 4 (e). In interpreting the identical review provision of the Federal Power Act (49 Stat. 860, 861), this Court squarely rejected a contention that an order setting a hearing and requir-

ing production of documents in initiating an investigation allegedly beyond the Commission's power was reviewable by a Court of Appeals, since a contrary construction would "afford * * * opportunity for constant delays in the course of the administrative proceeding" and "would do violence to the manifest purpose" of the review provision. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383, 384.[4] Allegations of jurisdictional defects and irreparable injuries in that case were held insufficient to convert an order of a "preliminary character" into one of "definitive character dealing with the merits of a proceeding before the Commission" reviewable under the Federal Power Act (304 U. S. at 384).

This Court, in addition, in its most recent examination of the Natural Gas Act stressed that the procedures authorized by the Act must be viewed as part of a single regulatory scheme providing Commission review and control over gas rates subject to the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*,

[4] This Court stated (304 U. S. at 384):

"The context in § 313 (b) [the review provision] indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court 'a transcript of the record upon which the order complained of was entered.' The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. *The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.*" [Emphasis added.]

350 U. S. 332. To make this preliminary step in the regulatory procedure the point at which the court may intervene to determine questions of the validity of the order would subvert the regulatory framework established by Congress in which "losses of one period must be counter-balanced against gains of another in any fair consideration of the reasonableness of the rate making procedure." *Hope Natural Gas Co.* v. *Federal Power Commission,* 196 F. 2d 803, 809 (C. A. 4). Since petitioner does not attack the constitutionality of the suspension power given the Commission but only its authority to investigate the proposed increase under Section 4 (e), the court below was manifestly correct in holding that it had no jurisdiction to review the interlocutory suspension order until such time as the Commission concluded its investigation, under that section, into the validity of the increased rate.

4. Petitioner also errs in its claim that the decision below conflicts with decisions of other Courts of Appeals, particularly *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 201 F. 2d 568 (C. A. 4), and *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. 2d 470 (C. A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.,* 350 U. S. 1005.

The *Atlantic* case involved an order which had the effect of suspending a rate change for six (not five) months following the filing date as determined by the court. The claim was not that the Section 4 (c) and 4 (d) filing requirements were inapplicable because the Commission could not determine the validity of the rate in a

Section 4 (e) proceeding, as petitioner contends here, but rather that the proposed increase had been filed earlier than the date found by the Commission, and thus that the Commission had exceeded the statutory limitation of five months in suspending the rate. Hence the real question before the Fourth Circuit was when the rate had been filed.

As the court below noted (Pet. App. 6, 7), the Fourth Circuit did not hold that it could review the validity of any suspension order issued by the Commission, for it recognized that it had no power under Section 19 (b) to review "mere preliminary or procedural orders or orders which do not finally determine rights of the parties" (201 F. 2d at 572). Its holding was a narrow one. Pointing out that the petitioner would be irreparably injured if it could not obtain relief from the Commission's order which purported to suspend "the increased rate schedules for a period of 22 days beyond the date when the Commission was legally authorized to suspend them" (201 F. 2d at 572), the Fourth Circuit held that the order was not a "mere preliminary or procedural" order because it finally determined certain rights, and that the issue raised as to the date the rate had been filed was "sufficiently distinct from the general subject of the litigation and sufficiently final and definitive to justify us in exercising the power of review vested in us by the statute." (*Ibid.*)

In contrast, in the present case, not only is there no irreparable injury (as we have shown, *supra,* pp. 4–7, 9–10), but there is no serious claim that the suspension was improper if Section 4 (e) was applicable to the rate increase (cf. fn. 6, infra, p. 16).

Hence, as we have also stressed, petitioner's real quarrel is not with the suspension order itself, but rather with the propriety of the Commission's proceeding under Section 4 (e) to inquire into its rate increase. This is a matter which, encompassing as it does the general subject of the litigation, can hardly be said to be distinct therefrom. Since review of this question can be obtained by petitioner, if it so desires, when the Commission issues its final order regarding the rate increase, the order here, unlike that in *Atlantic,* does not finally determine rights.

In the *Phillips* case in the Tenth Circuit, the Commission not only suspended contract rates which were charged by an independent producer on June 7, 1954 (the date of this Court's decision in *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U. S. 672, holding such producers subject to the Natural Gas Act) but in the same order had fixed lower rates to be charged by the producer pending a hearing as to the reasonableness of its contract rates. The Tenth Circuit noted that the suspension order undertakes "to establish with finality the wholesale rates which Phillips [the producer] was authorized to charge Michigan on June 7, 1954, and thereafter until changed by order of the Commission pursuant to hearing." (*Id.* at 475.) It went on to hold that the Phillips' Company was entitled to file as initial rate schedules those rates which it was actually charging on the date of this Court's *Phillips* decision, and hence that the Commission's order establishing a lower rate was invalid. Since the Tenth Circuit's decision involved a final order, it has no bearing on the present question.

Atlantic Seaboard and *Phillips* in the Tenth Circuit are alike in involving irreparable injury to a petitioner resulting from an order of the Commission found invalid on a ground separate and distinct from the substantive issues involved in the general proceeding in which the order was issued. Here, we have shown that the Commission was entitled to maintain the status quo while it determined whether it had jurisdiction over petitioner's rates under Section 4 (e), and that petitioner will not be injured by the suspension order if it is right in its basic argument.

5. Petitioner also contends that the decision below conflicts with this Court's recent decisions in *Frozen Food Express* v. *United States,* 351 U. S. 40 and *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192 (Pet. 14–16). *Frozen Food Express* involved a general order of the Interstate Commerce Commission, issued after hearing, finding certain commodities to be non-agricultural, and hence not within the Act's "agricultural" exemption. *Storer* concerned a Federal Communications Commission regulation of general applicability which was promulgated after hearing and by its terms prohibited a broadcaster from acquiring more than a limited number of stations. In both cases, the Court regarded agency action as complete and the issue was whether petitioners were aggrieved parties, entitled to obtain review of the agency order or regulation of general applicability, 351 U. S. at 44, 198.[8] In both cases, the Court held that, since the

[8] Having held that the parties had a right to review, the Court went on to consider the cases on the merits.

regulation had an immediate impact upon persons seeking to attack the orders, they had a right to maintain review. 351 U. S. at 44, 199, 200. Those rulings have no bearing on the present issue of whether a suspension order, which is only an interlocutory step in a still uncomplete proceeding, is subject to review prior to the completion of the proceeding. The two cases involved final agency action, the practical effect of which in one case was to deny petitioner the right to carry certain commodities, and in the other to limit the scope of petitioner's business; we have shown that the present order will have no impact on these petitioners if they are right in their main contention.[6]

6. One additional matter remains for consideration. In *Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411 (N. D. Tex.), a three-judge District Court in an opinion written by Judge Brown (the dissenting judge in the present case) held that it had

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[6] Petitioner argues (Pet. 18) that the suspension order was defective in that it failed to give the "reasons" for the suspension as required by Section 4 (e). The Court of Appeals properly refused to pass on this contention, since it disclaimed jurisdiction to review the order (Pet. App. 7, 8). It is clear in any case that the order stated the exact reasons which led the Commission to suspend: the Commission was in doubt, on the showing made by petitioner, whether the rate increase was "justified," or whether it might be "unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful." Therefore, the Commission suspended the rate and ordered a hearing on these questions (Pet. App. 3). No further reasons were required to explain a procedural order designed to obtain information necessary to support a Commission determination. Amplification of the Commission's doubts or objections was properly, indeed necessarily, left to the hearing.

jurisdiction to review and set aside an order of the Interstate Commerce Commission in effect refusing to suspend proposed reductions in railway rates for carbon black, and this Court has noted probable jurisdiction (No. 224, this Term).

While we think that *Borger* was wrongly decided, we believe that the present decision is distinguishable on a number of grounds and that even if there were an affirmance in *Borger* a reversal would not be required here. In *Borger,* the District Court apparently conceded that historically the Interstate Commerce Commission's exercise of its rate suspension powers are not subject to judicial review, but found reviewability in Section 10 of the Administrative Procedure Act. In contrast, in the present case, petitioner does not invoke the Administrative Procedure Act; its assertion of reviewability is based entirely upon the provisions of the Natural Gas Act and nowhere in its petition is the Administrative Procedure Act even mentioned, let alone relied upon.[7]

In addition, in *Borger,* it was alleged that the Interstate Commerce Commission's failure to suspend the schedules in question, reducing rates on carbon black, gave some carriers a competitive advantage over other carriers for the carbon black traffic and would impose irreparable injury. It was on the basis of these allegations that the District Court based its

[7] Indeed, despite its allegation of numerous other conflicts, petitioner here does not allege a conflict with *Borger*, and refers to *Borger* only in connection with its argument that the suspension order is invalid because of the Commission's alleged failure to state its reasons for the suspension (Pet. 18). See *supra*, p. 16, fn. 6.

conclusion of reviewability. Here, on the other hand, as shown, *supra*, pp. 5–7, 9–10, petitioner will not suffer any irreparable injury as a result of the suspension. If it turns out to be correct in its challenge to the Commission's action, there will be no injury at all; if, as we believe, its attack is invalid, the five-month loss through inability to charge the increase during that period will be a normal incident of rate regulation.

CONCLUSION

The decision below is correct and there is no true conflict of decisions. The petition for certiorari should therefore be denied. But if the Court is of the view that the question actually involved is the same as that in *Borger*, we would not oppose the granting of certiorari and the setting down of this case to be heard together with *Borger*.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 530

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 530

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I.

INTRODUCTION

The nature of the "Brief for the Federal Power Commission in Opposition" compels the filing of this reply.

The court below dismissed Petitioner's request for review of an order of the Federal Power Commission (Commission) suspending a periodic price step-up expressly set forth in Petitioner's sales contract filed with the Commission as Petitioner's initial rate schedule, which order was issued without hearing, and was by Petitioner asserted to be unlawfully issued

and to inflict irreparable injury upon Petitioner. Such dismissal of the petition was based by that court upon the ground that the review provision of the Natural Gas Act [§ 19(b), 52 Stat. 831 (1938); 15 U.S.C. 717r (1952)] "does not confer upon this Court jurisdiction to entertain it." *Humble Oil & Refining Company* v. *Federal Power Commission,* 236 F.2d 819, 823 (C.A. 5, 1956).

So resting its decision upon this procedural ground, the court below expressly refrained from disposing of Petitioner's contentions on the merits, saying (236 F. 2d at 823):

> "The conclusion we have reached that this Court has no jurisdiction to review the suspension order at this time, renders it both inappropriate and unnecessary to pass upon the contentions that the prices involved constituted 'initial rates', that the Commission failed to state 'reasons' for such suspension as required by the Act, and that the order is contrary to the Natural Gas Act and violates petitioner's rights under the Fifth Amendment to the Constitution of the United States."

Therefore, in our petition to this Court seeking a writ of *certiorari,* we confined the presentation to the single question of reviewability (Pet. 2). The Commission agrees that reviewability is the only question (Br. in Opp. 2), but bases its principal argument here on one of the points which the court below expressly declined to consider or decide, as we shall demonstrate hereinbelow.

We have no objection to this Court's consideration now of all issues not decided by the court below, along with the one which it did decide, if this Court should deem such a course to be proper. We hope, however,

for an opportunity to assist this Court's consideration by briefing and arguing all such issues at the proper time.

We think the Commission's brief in opposition has enabled a considerable advancement in the arrival of such time. For, as we shall show below, it joins Petitioner in demonstrating that the commission order here involved is reviewable. In these circumstances, we here request that, without the filing of further briefs or argument, this Court forthwith grant the writ of *certiorari*, simultaneously reversing the decision below on reviewability and remanding the case with directions to the court below to consider and decide the remaining issues presented by the petition for review.

II.

COMMISSION CONCEDES REVIEWABILITY AND DEMONSTRATES CONFLICT WITH OTHER CIRCUITS

Referring to its suspension authority under the Natural Gas Act,[1] the Commission asserts that a "Section 4(e) suspension is *normally* interlocutory in character, and so not reviewable, at least in the absence of *true* irreparable injury" (Br. in Opp. 7-8; italics supplied). We agree.

Suspension orders were held reviewable in *Atlantic Seaboard Corporation* v. *Federal Power Commission,* 201 F.2d 568 (C.A. 4, 1953) and in *Phillips Petroleum Company* v. *Federal Power Commission,* 227 F.2d 470 (C.A. 10, 1955), *cert.* den., 350 U.S. 1005 (1956). In each case, as we pointed out (Pet. 6-9), the suspension order was in part invalid and determinable so to be

[1] § 4(e), 52 Stat. 822 (1938); 15 U.S.C. 717c (1952).

without hearing. In neither case did the Commission seek *certiorari*. And as we shall now show, the Commission concedes reviewability in our case by its agreement that both *Atlantic Seaboard* and *Phillips* were rightly decided (Br. in Opp. 12-15).

Both cases, the Commission says (Br. in Opp. 15), are "alike in involving irreparable injury." But it argues that our case differs in that there is no irreparable injury (Br in Opp. 6-7, 9-10, 15).

Let us examine the basis for this argument of the Commission, advanced in the face of the loss to Petitioner of $112,500 and other injury, all inflicted by the suspension involved. According to the Commission, Petitioner should await the Commission's ultimate order after a conclusion of an investigation and hearing. If the Commission should then hold, or if a court reviewing such order should hold, that the May 19, 1955, suspension order was invalid (Br. in Opp. 7):

> " * * * the increased rate will have been the 'filed' rate from the date on which petitioner asked that it be effective and petitioner would not be precluded from collecting the full amount of the increase from [its purchaser]."[2]

With regard to this keystone conclusion, five observations are here in order.

(1) So far as there is merit to the Commission's opposition here, its brief plainly depends for substance on this conclusion.

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[2] Elsewhere, the Commission inconsistently states: "Since Nov. 1, 1955, petitioner has been collecting the increase under bond and the Commission's action has resulted in loss to it, if at all, only for the five months' suspension period" (Br. in Opp. 9).

(2) The Commission understandably fails to cite any authority for such conclusion. The novel suggestion comes here late in the day, despite many prior opportunities here and elsewhere for its advancement by the Commission.

(3) If that conclusion were correct, it would demonstrate that *Atlantic Seaboard* and *Phillips* were incorrectly decided by Circuits sister to the court below. For it is inescapable that, in each of those cases, the Commission in its ultimate order, or a court reviewing it, might have corrected the invalidity in the suspension order, thus enabling the company to be made whole, *if* the above-quoted Commission conclusion be correct. This leaves the Commission, with the majority of the court below (see Pet. 7-8), asserting but never attempting to show how *Atlantic Seaboard* is "clearly distinguishable from the case at bar" (236 F.2d at 823). In any event, the Commission's brief joins us in demonstrating the need for review by this Court because of the conflict of the decision below with those of other Circuits.

(4) Assuming *arguendo* the correctness of the Commission's conclusion that Petitioner's right to the higher rate should be deferred pending investigation and hearing because the invalidity of the suspension order is remediable in the ultimate rate order, that conclusion would alone demonstrate such irreparable injury as to show the immediate reviewability of the May 19, 1955, suspension order.

Petitioner would be thus required needlessly to waste its own time and funds, and those of the Commission, in a useless hearing, launched by an order determinable at the outset to be invalid. For if the

suspension order be invalid, the whole rate hearing would, as a consequence, be void and ineffectual for any proper purpose.

Furthermore, over one year elapsed here before the launching of an investigation, which is still under way.[3] Quite some additional time must pass before an "ultimate" order can issue. Meanwhile, the impact of the higher rate would have been passed on from purchaser to purchaser to ultimate consumer. To an extent not predictable, equities would remain restorable through a series of refunding operations. If it should be held in the Commission's ultimate order, or thereafter be judicially determined, that the suspension order was invalid, Petitioner could sue for the higher rate thereby made effective during the suspension period, under the Commission's suggestion. So also, presumably, could each purchaser in the chain, even extending to a multitude of suits against ultimate consumers. To all of this, there must be added the series of prolonged and burdensome collections under refund by the several sellers, if we are fairly to weigh the total effect of the Commission's suggestion for postponing judicial review of a suspension order determinable to be invalid when issued.

As to losses inflicted by such an order, we think it irrational for the Commission to assert (Br. in Opp. 9-10) that they are a " 'necessary incident of rate regulation' ", a phrase it quotes from language used by the Fourth Circuit to refer to such loss as may be inflicted by a *valid* suspension order. *Hope Natural Gas Co.* v. *Federal Power Commission,* 196 F.2d 803, 809 (C.A. 4, 1952).

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[3] We do not imply a criticism of the Commission, which, in view of its recently determined authority over independent producers, has a greatly increased workload.

(5) Finally, if we should await the ultimate rate order to attack the suspension order, as the Commission suggests, what logical answer would we have for a Commission reply, pointing to the foregoing irreparable injury and to *Atlantic Seaboard* and *Phillips,* and asserting that our attack is barred since not made "within sixty days after the order of the Commission" denying rehearing of the suspension order? § 19(b), 52 Stat. 831 (1938), 15 U.S.C. 717r (1952). Indeed, we could claim only a partial admission against interest by referring to the Commission's brief in opposition here. For it claims that the ultimate rate order can remedy only one of the principal points on the merits which we advanced in the court below, that is, that the rate here involved is not suspendible because it is part of an initial rate schedule (Br. in Opp. 4-5). But the Commission makes no such contention as to another main point on the merits which we urged below, that is, that the suspension order was illegally issued for want of a mandatory statement in writing by the Commission of its reasons for the suspension.[4] Clearly, if the right of review is barred, there can be no question but that irreparable injury will be suffered; the increase in revenues from the higher price would be plainly and irretrievably lost for the five-month period.

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[4] If the Commission's failure at the time of suspension to satisfy the requirement for a statement of its reasons can be later attacked in review of the Commission's ultimate rate order, then hundreds of pending suspension proceedings will long continue in a state of uncertain jeopardy, but relatively few such proceedings can be affected if this point must be raised in review of the suspension order itself. There is no indication whether the Commission took this factor into consideration in refraining here from indicating whether a suspension's invalidity for want of a statement in writing is remediable in the ultimate rate order (Br. in Opp. 16, n. 6, with which compare pp. 4-5).

It is manifest from all of the foregoing that the Commission has joined Petitioner in effectively demonstrating the conflict between the opinion of the court below and that of its sister Circuits in *Atlantic Seaboard* and *Phillips*.[5]

The Commission concedes that the suspension order is reviewable, as we have shown, and this leaves the Government without defense for the error of the court below. And since the decision below has been shown to conflict with decisions of this Court (Pet. 10-16), a reversal forthwith is in order.

III.

COMMISSION PREMATURELY PRESENTS ONE SIDE OF ISSUES ON MERITS

In a seeming effort to divert attention from the instability of its position on the only issue here involved—reviewability—the Commission devotes the entirety of its principal point to an argument on the merits of Petitioner's "basic premise," a point not here involved (Br. in Opp. 4-5). Indeed, it concludes

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[5] We do not overlook the Commission's reference to two unreported orders of the United States Court of Appeals for the District of Columbia Circuit, dealing with certain suspension orders, in *Northern Natural Gas Company* v. *Federal Power Commission*, No. 10726, dismissed February 8, 1951, and *Columbian Fuel Corp.* v. *Federal Power Commission*, No. 13129, dismissed November 13, 1956 (Br. in Opp. 6-7).

In each of these cases and without analysis, that court declined review, depending expressly upon authority stemming from its earlier decision in *United Gas Pipe Line Co.* v. *Federal Power Commission*, 86 App. D.C. 314, 181 F.2d 796 (1950), *cert.* den., 340 U.S. 827 (1950).

But *United* affords no help in those cases or here since it merely holds to be nonreviewable legislative rules of general applicability and of no present effect.

such point with the remarkably frank statement that (Br. in Opp. 5):

> "Regardless of whether suspension orders are or are not reviewable, there is therefore no occasion for the Court to consider this case."

The court below concluded that it had no jurisdiction to review and that this rendered it "inappropriate and unnecessary" to decide our substantive contentions on the merits (236 F.2d at 823). Therefore, we deemed it improper here to advance such contentions in our petition. And while we shall continue so to refrain here, we are compelled to deny that our basic contentions were decided in any of the cases on which the Commission depends in here urging its view on the merits.[6]

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[6] One principal point on the merits which we urged below—and which the court did not reach—was our claim that the rate involved is expressly and specifically set forth in Petitioner's contract which was filed with the Commission pursuant to its direction as Petitioner's initial rate schedule, and is thus not suspendible because not a "change" within the meaning of the Act or of the regulations especially promulgated for application to independent producers, relying upon principles laid down in, among other cases, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

The Commission here asserts that this issue is "identical" to that in *Cities Service Gas Producing Company* v. *Federal Power Commission*, 233 F.2d 726 (C.A. 10, 1956), *cert.* den., —— U.S. ——, 77 S. Ct. 149 (1956). This is not so. In the first place, that case did not even involve a suspension order. Instead, it concerned the validity of a commission rejection of certain rate filings made by the company because they constituted proposals to change prices in effect on June 7, 1954. The court held that the basic contract "contemplates prospective adjustment of prices" and that the filings tendered constituted an ineffectual attempt to alter rates retroactively (233 F.2d at 730). Indeed, in its brief in opposition, the Commission there pointed out that the petitioner in that case did not challenge the fact that these rate filings necessarily proposed "changes" in its June 7

Moreover, we refuse to believe that this Court will so administer justice as to decline to hear a proper procedural issue, basing its refusal upon premature one-sided Government suggestion of disagreement with Petitioner's undeveloped position here on questions not reached by the court below.

A separate point regarding the merits requires

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rates, nor did petitioner claim that such rate "changes" were in accordance with the applicable requirements (Br. in Opp., No. 418, p. 9). In our case, we did and do emphatically deny that rate "changes" are involved, asserting that the commission's suspension order is invalid for this reason, among others.

Likewise, the Commission seeks support from its own brief in opposition in *Continental Oil Company* v. *Federal Power Commission*, No. 457, this Term, in which review is sought of *Continental Oil Company* v. *Federal Power Commission*, 236 F.2d 839 (C.A. 5, 1956). Examination of that decision, however, discloses that it—like *Cities Service* and unlike our case—did not involve a suspension order. Instead, it concerned the validity of a commission refusal to grant a retroactive effective date for certain rate filings, the court holding that "the Commission's order waiving notice and permitting petitioner's change in rates to become effective on the date of filing was issued pursuant to statutory authority and is valid" (236 F.2d at 842). Moreover, in its brief in opposition in *Continental*, the Commission's statement of the question shows clearly that the issue there was, as we noted above, whether the Commission erred in refusing to allow the requested retroactive effective date, a question not even present in our case (Br. in Opp., No. 457, p. 2).

Finally, the Commission here cites *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F.2d 388 (C.A. 5, 1947), *cert.* den., 332 U.S. 770 (1947) and *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F.2d 159 (C.A. 8, 1941). But neither of these cases did or could involve the issue here, since, among other reasons, the differing regulations here involved were promulgated only recently.

With respect to another main point on the merits, see note 7 below.

mention.[7] In the court below, we contended that the suspension order was invalid for want of a mandatory "statement in writing" by the Commission of its "reasons" for the suspension. The Commission here says, however, that "there is no *serious* claim" that the suspension was improper if § 4(e) is applicable (Br. in Opp. 13; italics supplied). This is presumably the Commission's way of disagreeing with one of our principal points on the merits in the court below. Also, we note that the Commission later gives enlarged attention to this point (Br. in Opp. 16, n. 6).

In connection with the seriousness of this point, we, along with the Commission (Br. in Opp. 16-18), observe that this Court has recently noted probable jurisdiction (No. 224, this Term) in respect of *Amarillo-Borger Express, Inc.* v. *United States,* 138 F.Supp, 411 (N.D. Tex., 1956).

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[7] Our claim that the suspension order's stereotyped recital that the suspended rate may be unjust and unreasonable falls far short of fulfilling the statutory mandate finds support in: *Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411 (N.D. Tex., 1956), probable jurisdiction noted, No. 224, this Term; *Long Island Rail Road Company* v. *United States,* 140 F. Supp. 823 (E.D.N.Y., 1956); *Dixie Carriers, Inc.* v. *United States,* 143 F. Supp. 844 (S.D. Tex., 1956); *cf. American Airlines Inc.* v. *Civil Aeronautics Board,* —— App. D.C. ——, 235 F.2d 845 (C.A.D.C., 1956); and *Boudin* v. *Dulles,* —— App. D.C. ——, 235 F.2d 532 (C.A.D.C., 1956).

For example, absent a meaningful statement of its reasons, as expressly required by the Act, how could it be determined whether the Commission acted arbitrarily in suspending for the maximum five-month period, rather than for a period of one day or one month?

IV.

COMMISSION MISAPPLIES METROPOLITAN EDISON

At the three places numbered below, the Commission's brief seeks to insinuate a likeness here to the investigation situation where a Commission order was held not reviewable in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938):

(1) "Petitioner (Pet. 12, 13) claims however, that the Commission had no authority to investigate into the reasonableness of the rate increase under Section 4(e) and that the Commission, accordingly, is without power to suspend the proposed increase provided for in the escalation clause" (Br. in Opp. 10; parentheses are Commission's).

Pages 12 and 13 of our petition are devoted to distinguishing *Metropolitan Edison,* and will be searched in vain for any such claim as thus attributed by the Commission. We elsewhere say that, since there is no rate increase involved here, § 4(e) is entirely inapplicable. We do not dispute the Commission's power to investigate under § 5 of the Act.

(2) "Since petitioner does not attack the constitutionality of the suspension power given the Commission but only its authority to investigate the proposed increase under Section 4(e), the court below was manifestly correct in holding that it had no jurisdiction to review the interlocutory suspension order [at this time]" (Br. in Opp. 12).

We say the Commission errs in assuming, contrary to fact and law, that an "increase" under § 4(e) is involved. In any event, its misdirected suggestion that we are here disputing the Commission's "authority to investigate" and its characterizing of the instant sus-

pension order as "interlocutory" cannot substitute for a parallel to *Metropolitan Edison.*

(3) "Hence, as we have also stressed, petitioner's real quarrel is not with the suspension order itself, but rather with the propriety of the Commission's proceeding under Section 4(e) to inquire into its rate increase" (Br. in Opp. 14).

This is simply not so. Our real and only quarrel here concerns the reviewability of the suspension order.

We submit that a careful reading of the foregoing statements by the Commission suffices alone to dispel the attempted suggestion of similarity between the issue here and that decided in *Metropolitan Edison.* Compare Pet. 11-14 with Br. in Opp. 10-11.

V.

THE COMMISSION'S BORGER DILEMMA

In *Amarillo-Borger Express, Inc.* v. *United States,* 138 F.Supp. 411 (N.D. Tex., 1956), a three-judge district court held that it was authorized to review an order of the Interstate Commerce Commission vacating its earlier order suspending certain proposed reductions in railway rates. The court further held the commission's order invalid for failure to include a statement of the reasons underlying its action, the court deeming insufficient the order's recital of " 'good cause appearing therefor' " (138 F.Supp. at 417).

As already pointed out, this Court has noted probable jurisdiction in *Borger* (No. 224). In September, 1956, the Government filed in that proceeding a "Supplemental Memorandum for the United States and the Interstate Commerce Commission," inviting this

Court's attention to the *Humble* decision below and a number of other cases simultaneously decided by the United States Court of Appeals for the Fifth Circuit, the Government asserting that:

> "In these cases the Fifth Circuit has, in effect, rejected the very basis of the district court decision sought to be reviewed in the instant appeal."

In our case, the Government thinks *Borger* "distinguishable on a number of grounds" (Br. in Opp. 17), but concludes by stating that (*ibid.* 18):

> "The decision below is correct and there is no true conflict of decisions. The petition for certiorari should therefore be denied. But if the Court is of the view that the question actually involved is the same as that in *Borger,* we would not oppose the granting of certiorari and the setting down of this case to be heard together with *Borger.*"

In *Borger,* one issue is: "Whether the Commission's order vacating the suspension is subject to judicial review" (Jurisdictional Statement, No. 224, p. 3). If an order vacating a suspension order is reviewable, surely, on principle, an order suspending a rate should also be reviewable. Indeed, *Borger* apparently once seemed to the Government to be like our case—and then later not to be. See the two preceding paragraphs.

In his dissent below in *Humble,* Judge Brown apparently views *Borger* as contrary to the decision of the majority (236 F.2d at 809-810), and it was he who wrote the opinion in *Borger.* This is an additional circumstance which indicates that a necessity for review exists in the present case. In any event, we think that the difference in controlling review provisions

and the fact that *Borger* presents other issues not here involved or briefed combine to require separate treatment.

VI.

CONCLUSION

WHEREFORE, for the reasons set out hereinabove and in the petition filed herein, we urge that a writ of *certiorari* be granted, and that, without the filing of further briefs or argument, this Court similtaneously reverse the decision below and remand the case with directions to the court below to consider and decide the remaining issues presented by the petition for review.

Respectfully submitted,

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Certificate of Service

I, Bernard A. Foster, Jr., certify that the foregoing "Petitioner's Reply to Brief in Opposition" was served upon each party named below by depositing a copy of the same in a United States mailbox in Washington, D. C., with first class postage prepaid, addressed as indicated below, this 14th day of December 1956.

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